SUPREME COURT, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1995

DAVID J. STEINBERG,

Petitioner,

v.

J. REID BINGHAM, as Ancillary Administrator of the ESTATE OF ROBERT NESTA MARLEY; MARVIN ZOLT; and ZOLT & LOOMIS, P.C.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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102 pp

QUESTIONS PRESENTED FOR REVIEW

1. When does a civil action accrue under the Racketeer Influenced and Corrupt Organizations Act (RICO)?

2. Are RICO's "pattern" and "enterprise" requirements unconstitutionally vague?

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PETITION FOR WRIT OF CERTIORARI

Petitioner David J. Steinberg respectfully prays that a writ of certiorari issue to review the judgment and opinion that the United States Court of Appeals for the Second Circuit entered in this proceeding on September 28, 1995.

OPINIONS BELOW

The Second Circuit's opinion is reported, *see Bingham* v. *Zolt*, 66 F.3d 553 (1995), and is reprinted in the appendix, App. to Pet. for Cert. 1a-28a.

Steinberg filed a timely petition for rehearing containing a suggestion for rehearing *in banc*. On November 15, 1995, the Second Circuit entered an order denying the petition for rehearing. That order is not reported but is reprinted in the appendix. App. to Pet. for Cert. 76a-77a.

The opinion of the United States District Court for the Southern District of New York denying Steinberg's post-judgment motions is reported, *see Bingham* v. *Zolt*, 823 F. Supp. 1126 (S.D.N.Y. 1993), and is reprinted in the appendix, App. to Pet. for Cert. 29a-50a. An earlier opinion of the district court, initially dismissing the RICO claims against Steinberg, is reported, *see Bingham* v. *Zolt*, 683 F. Supp. 965 (S.D.N.Y. 1988), and is reprinted in the appendix, App. to Pet. for Cert. 51a-75a.

district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. §1964(c).

STATEMENT OF THE CASE

A. In the decision under review, the United States Court of Appeals for the Second Circuit acknowledged the existence of "a split among the circuits generating as many as half a dozen conflicting [RICO] accrual rules." *Bingham* v. *Zolt*, 66 F.3d 553, 559 (1995); App. to Pet. for Cert. 10a.

The Second Circuit in civil RICO actions applies a "separate accrual" rule borrowed from the Clayton Act, 15 U.S.C. §15b. *See Bankers Trust Co.* v. *Rhoades*, 859 F.2d 1096, 1104-05 (1988), *cert. denied*, 490 U.S. 1007 (1989). In the decision under review, the Second Circuit employed its "separate accrual" rule to hold that the RICO claims asserted against Steinberg were timely notwithstanding the jury's express finding that "the estate had actual knowledge of the wrongful acts before December 10, 1982, more than four years before suit was brought." 66 F.3d at 558; App. to Pet. for Cert. 8a.

In *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156-57 (1987), the Court held that a uniform four-year statute of limitations applies to civil RICO actions but did not reach the question of when a civil RICO claim accrues. Since 1987, the split among the circuits on the question of when a civil RICO claim accrues has persisted and widened. Indeed, Steinberg stands liable for damages under RICO because he was sued in the

Second Circuit although he could not have been held liable in the Fifth Circuit, where a civil RICO claim accrues when the plaintiff discovers the defendant's wrongful acts. *See La Porte Constr. Co.* v. *Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (CA5 1986).

Steinberg argued below, both to the district court and to the Second Circuit, that the RICO claims asserted against him were time-barred. At trial, the jury expressly found that the plaintiff, the Estate of Jamaican reggae superstar Robert Nesta ("Bob") Marley, had both actual and constructive knowledge of Steinberg's allegedly wrongful acts more than four years before it asserted civil RICO claims against Steinberg. Second Circuit Appendix ("CA2 App.") 393-94 (verdict sheet). Nevertheless, the Second Circuit held that the RICO claims were not time-barred. 66 F.3d at 561; App. to Pet. for Cert. 16a.

B. The Second Circuit also ruled, in the decision under review, that RICO's "pattern" and "enterprise" requirements were not unconstitutionally vague as applied to Steinberg. *Bingham* v. *Zolt*, 66 F.3d at 566; App. to Pet. for Cert. 28a.

In *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 251-56 (1989) (SCALIA, J., concurring in the judgment), JUSTICE SCALIA, joined by CHIEF JUSTICE REHNQUIST and JUSTICES O'CONNOR and KENNEDY, wrote that the majority's inability to define RICO's pattern requirement in a manner that was not vague "bodes ill for the day when" a constitutional challenge to RICO's pattern requirement is presented, *id.* at 256.

Based on the opinion concurring in the judgment in *H.J. Inc.*, Steinberg argued to the district court and on

appeal to the Second Circuit that RICO's "pattern" and "enterprise" requirements were unconstitutionally vague as applied to him.

Steinberg's vagueness argument was based, in part, on the fact that the civil RICO claims brought against him did not allege that he was involved in "organized crime." Rather, the Estate alleged that Steinberg, while serving as an attorney for Bob Marley's Estate, committed acts of mail and wire fraud that prevented the Estate from becoming the direct owner of certain businesses that Bob Marley allegedly owned at the time of his death. The Estate further alleged that Rita Marley (Bob Marley's widow, his primary heir and the co-administrator of his Estate) became the direct owner instead. There has never been any suggestion that organized crime played any part in this case.

The four Justices who in *H.J. Inc.* voiced a concern that RICO's "pattern" requirement was unconstitutionally vague remain on the Court. They have since been joined by JUSTICES SOUTER, THOMAS, GINSBURG and BREYER, suggesting that a majority may now exist to declare RICO's "pattern" requirement unconstitutionally vague. Nevertheless, both the district court and the Second Circuit rejected Steinberg's vagueness challenge to RICO's "pattern" and "enterprise" requirements.[1]

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[1] The vague nature of RICO's "enterprise" requirement was demonstrated in this action. The district court originally dismissed the Estate's RICO claims against Steinberg "without leave to replead," *Bingham* v. *Zolt*, 683 F. Supp. 965, 971 (S.D.N.Y. 1988); App. to Pet. for Cert. 61a, stating that "[t]he Court is not persuaded that the fraudulent diversion of specific – albeit

C. On December 10, 1986, plaintiff J. Reid Bingham, in his capacity as ancillary administrator of the Estate of Robert Nesta Marley, filed this suit in the United States District Court for the Southern District of New York. The district court exercised subject matter jurisdiction pursuant to 18 U.S.C. §1964(c) and 28 U.S.C. §1331.

One of the defendants named in the suit was David J. Steinberg, who had served as Bob Marley's attorney and, following the musician's untimely death, continued to render legal services to the musician's Estate. Among the claims asserted against Steinberg were civil RICO claims pursuant to 18 U.S.C. §1962(b), (c) and (d).

Following nearly six years of pretrial proceedings, this suit went to trial in August of 1992. Trial lasted twelve weeks, and the jury found Steinberg liable on the Estate's RICO claims.

The district court instructed the jury to return specific findings regarding when the Estate knew, and when the Estate should have known, of Steinberg's allegedly wrongful acts. The jury expressly found that the Estate had actual knowledge of Steinberg's allegedly wrongful acts prior to December 10, 1982, more than four years before the Estate filed this suit. CA2 App. 393 (verdict sheet). The jury also found that before December 10, 1982 "a duty arose on the part of the Estate to inquire into or investigate the question of the allegedly diverted Estate

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income-producing – assets without the threat of continuing criminal activity supports the existence of a RICO enterprise . . . ," *id.* at 970; App. to Pet. for Cert. 59a. The district court later reconsidered its ruling and allowed the Estate's RICO claims against Steinberg to proceed to trial.

assets" and that the Estate failed to "make an inquiry that was reasonably diligent under the circumstances." CA2 App. 393-94.

The jury awarded $800,000 in damages to the Estate on its RICO claims, CA2 App. 394, which the district court later trebled, *see* 18 U.S.C. §1964(c). The district court also permitted the Estate to recover its attorneys' fees and costs pursuant to §1964(c), ultimately awarding to the Estate attorneys' fees and costs totaling $3,029,428.46. *Bingham* v. *Zolt*, 823 F. Supp. at 1137; App. to Pet. for Cert. 49a. Accordingly, on the Estate's RICO claims, the district court awarded damages, attorneys' fees and costs totaling in excess of $5.4 million.[2]

The district court rejected Steinberg's post-judgment motions, which argued both that the Estate's RICO claims were time-barred, *id.* at 1130; App. to Pet. for Cert. 30a-32a, and that RICO's "pattern" and "enterprise" requirements were unconstitutionally vague as applied to Steinberg, *id.* at 1132; App. to Pet. for Cert. 36a-37a.

Steinberg appealed from the verdict and the district court's post-judgment rulings to the United States Court of Appeals for the Second Circuit. On December 12, 1994, a panel composed of Chief Judge Newman and Senior

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[2] Under the terms of the district court's amended judgment, Steinberg is jointly and severally liable for the RICO damages, attorneys' fees and costs with two of his co-defendants, Marvin Zolt and Zolt & Loomis, P.C. App. to Pet. for Cert. 81a. As the Second Circuit noted, however, "for purposes of contribution the jury found that Steinberg was liable for 75 percent and Zolt for 25 percent of [the judgment]." *Bingham* v. *Zolt*, 66 F.3d at 559; App. to Pet. for Cert. 9a.

Circuit Judges Oakes and Cardamone heard oral argument.

On September 28, 1995, the Second Circuit issued an opinion affirming the district court's judgment. The Second Circuit noted that its RICO accrual rule was but one of "as many as a half a dozen conflicting [RICO] accrual rules" that have resulted in "a split among the circuits . . . . " *Bingham* v. *Zolt*, 66 F.3d at 559; App. to Pet. for Cert. 10a.

Applying its "separate accrual" rule, the Second Circuit held that the Estate's RICO claims were not time-barred, *id.* at 559-61; App. to Pet. for Cert. 10a-16a, despite the jury's finding that "the estate had actual knowledge of the wrongful acts before December 10, 1982, more than four years before suit was brought," *id.* at 558; App. to Pet. for Cert. 8a. The court reasoned that because damages continued to flow from Steinberg's allegedly wrongful acts during the four years preceding the Estate's suit, the suit was timely to recover those damages. *Id.* at 559-61; App. to Pet. for Cert. 10a-16a.

The Second Circuit also rejected Steinberg's vagueness challenge to RICO's "pattern" and "enterprise" requirements. The court, citing two of its opinions in criminal RICO appeals brought by defendants who had been convicted due to involvement in organized crime, wrote:

> "Finally, Steinberg urges that RICO's pattern and enterprise requirements are unconstitutionally vague as applied to himself. His assertion relies on Justice Scalia's concurring opinion in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251-56 (1989), criticizing the Supreme Court's inability to define

> RICO's pattern and enterprise requirement. We have consistently held that RICO's pattern and enterprise requirements are not unconstitutionally vague. *See United States v. Coiro*, 922 F.2d 1008, 1017 (2d Cir.), *cert. denied*, 501 U.S. 1217 (1991); *United States v. Coonan*, 938 F.2d 1553, 1561-62 (2d Cir. 1991), *cert. denied*, 503 U.S. 941 (1992)." *Id.* at 566; App. to Pet. for Cert. 28a.

After the Second Circuit ruled, Steinberg filed a timely petition for rehearing containing a suggestion for rehearing *in banc*. Therein, Steinberg asked the Second Circuit to abandon its oft-criticized "separate accrual" rule and instead adopt the "discovery rule," which the Fifth Circuit applies in RICO cases. *See La Porte Constr. Co.* v. *Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (CA5 1986). Under the "discovery rule," Steinberg explained, the RICO claims asserted against him clearly would be time-barred given the jury's finding that the Estate possessed actual knowledge of Steinberg's allegedly wrongful acts more than four years before it filed this suit.

In an order issued November 15, 1995, the Second Circuit denied Steinberg's petition for rehearing. App. to Pet. for Cert. 76a-77a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Presents The Recurring And Important Issue Of When A Civil RICO Action Accrues, An Issue On Which The United States Courts Of Appeals Are Sharply In Conflict

In *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987), the Court held that a uniform four-

year statute of limitations applies to civil RICO actions. While the Court granted certiorari in that case to decide *both* the appropriate statute of limitations for a civil RICO claim *and* when a civil RICO claim accrues, the Court's selection of a four-year statute of limitations gave the Court "no occasion to decide the appropriate time of accrual for a RICO claim." *Id.* at 157. The question that *Agency Holding Corp.* left unresolved is squarely presented here.

The Second Circuit in the decision under review remarked on the split among the circuits that continues to exist regarding when a civil RICO action accrues. The court wrote:

> "No specific limitations period is provided in the RICO statute. The Supreme Court announced a uniform four-year limitations period for civil RICO actions, but expressly declined to decide the question of when such civil RICO actions accrue. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156-57 (1987). The result has been a split among the circuits generating as many as half a dozen conflicting accrual rules. *See generally* Mary S. Humes, Note, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399 (1990); Paul B. O'Neill, Note, *'Mother of Mercy, Is This the Beginning of RICO?': The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. Rev. 172 (1990); *see also In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litig.*, 850 F. Supp. 1105, 1116-17 and 1117 n.8 (S.D.N.Y. 1993) (summarizing the conflict). A civil RICO action has been held to accrue upon, *inter alia*, the commission of the last predicate act, *see, e.g., County of Cook v. Berger*, 648 F. Supp. 433 (N.D. Ill. 1986), plaintiff's discovery of the last predicate act, *see, e.g., Keystone Ins. Co. v.*

> *Houghton*, 863 F.2d 1125 (3d Cir. 1988), or plaintiff's discovery of his resulting injuries, *see, e.g., La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254 (5th Cir. 1986).
>
> "In this Circuit we recognize a 'separate accrual' rule under which a new claim accrues, triggering a new four-year limitations period, each time plaintiff discovers, or should have discovered, a new injury caused by the predicate RICO violations." *Bingham v. Zolt*, 66 F.3d 553, 559 (1995); App. to Pet. for Cert. 10a-11a.

See also McCool v. Strata Oil Co., 972 F.2d 1452, 1455 (CA7 1992) ("we must also decide when a civil RICO claim accrues, a question on which the other circuits, and the district courts in this circuit, are deeply divided").

The "separate accrual" rule that the Second Circuit employs, adopted in *Bankers Trust Co.* v. *Rhoades*, 859 F.2d 1096, 1104-05 (1988), *cert. denied*, 490 U.S. 1007 (1989), has been rejected by the Third, Eighth, Tenth and Eleventh Circuits. *See Granite Falls Bank* v. *Henrikson*, 924 F.2d 150, 153-54 (CA8 1991); *Bath* v. *Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (CA10 1990) (per curiam); *Bivens Gardens Office Bldg., Inc.* v. *Barnett Bank of Fla., Inc.*, 906 F.2d 1546, 1552-55 (CA11 1990), *cert. denied*, 500 U.S. 910 (1991);[3] *Keystone Ins. Co.* v. *Houghton*, 863 F.2d 1125, 1133-35 (CA3 1988).

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[3] The Sixth Circuit, while not expressly rejecting the Second Circuit's "separate accrual" rule, has implicitly rejected the Second Circuit's approach by choosing to apply the conflicting RICO accrual rule that the Eleventh Circuit announced in *Bivens Gardens*. *See Caproni* v. *Prudential Sec., Inc.*, 15 F.3d 614, 619-20 (CA6 1994).

The Second Circuit's "separate accrual" rule is also in conflict with the RICO accrual rule that the Fifth Circuit uses. In *La Porte Constr. Co.* v. *Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (CA5 1986), the Fifth Circuit held that it would employ in civil RICO actions the "discovery rule," which is the rule of accrual most commonly applied to federal claims. *See* Mary S. Humes, Note, *RICO and a Uniform Rule of Accrual*, 99 YALE L.J. 1399, 1409-10 (1990) ("The discovery rule is the general Federal rule of accrual – the method which governs Federal causes of action in the absence of a specific designation by Congress of another method.").[4]

These conflicting decisions demonstrate that the "uniform statute of limitations" which the Court adopted in *Agency Holding Corp.*, 483 U.S. at 149, has not produced, and will not produce, uniform results until this Court decides when a civil RICO action accrues.

The conflict described herein therefore warrants the Court's review. The important issue of when a civil RICO action accrues has arisen in many cases in recent years and will no doubt continue to arise frequently. This case presents the issue squarely and is an appropriate case in which to consider and resolve the issue.

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[4] The state courts of New York, which hear civil RICO actions in accord with this Court's ruling in *Tafflin* v. *Levitt*, 493 U.S. 455 (1990), have also rejected the Second Circuit's "separate accrual" rule. *See Podraza* v. *Carriero*, 212 A.D.2d 331, ___, 630 N.Y.S.2d 163, 168 (4th Dep't), *motion for leave to appeal dism'd*, 86 N.Y.2d 885 (1995). When the statute of limitations accrues with respect to a civil RICO claim filed in New York thus depends on whether the claim is filed in state or federal court.

Should review be granted, Steinberg intends to argue that the correct RICO accrual rule is the "discovery rule" that courts most commonly apply to federal claims. The "discovery rule," which the Fifth Circuit applies in RICO cases, *see La Porte Constr. Co.*, 805 F.2d at 1256, would lead to the dismissal of the Estate's RICO claims against Steinberg as time-barred.

As the Fifth Circuit explained in *La Porte*, "the period of limitations does not commence until the injured party discovers, or, in the exercise of reasonable diligence, should have discovered, the alleged fraud." *Id.* at 1256. The Second Circuit observed in the opinion below that the jury "found the estate had actual knowledge of the wrongful acts before December 10, 1982, more than four years before suit was brought." *Bingham* v. *Zolt*, 66 F.3d at 558; App. to Pet. for Cert. 8a. Accordingly, had the Estate filed its suit in the Fifth Circuit, rather than in the Second, the Estate's RICO claims against Steinberg would have been dismissed as time-barred.[5]

For these reasons, Steinberg respectfully requests that certiorari be granted to resolve the split among the

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[5] Other courts of appeals have recognized, in conflict with the Second Circuit's ruling below, that the continued flow of damages from an accrued RICO claim does not restart the statute of limitations clock. *See Association of Commonwealth Claimants* v. *Moylan*, 71 F.3d 1398, 1403-04 (CA8 1995) ("the limitations period begins to run even though the injured party, knowing he has suffered an injury, may not yet know the full extent of his injuries"); *Glessner* v. *Kenny*, 952 F.2d 702, 708 (CA3 1991) ("the mere continuation of damages into a later period will not serve to extend the statute of limitations").

circuits concerning the important question of when a civil RICO action accrues.

II. The Decision Below Presents The Issue Whether RICO's "Pattern" And "Enterprise" Requirements Are Unconstitutionally Vague, An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By The Court

Each of the civil RICO claims on which the Estate prevailed against Steinberg required the existence of a "pattern" and an "enterprise." *See* 18 U.S.C. §1962(b)-(d). Steinberg argued to the courts below that RICO's "pattern" and "enterprise" requirements are unconstitutionally vague in violation of Steinberg's right to due process under the Fifth Amendment to the United States Constitution.

In *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 251-56 (1989) (SCALIA, J. concurring in the judgment), the four Justices who concurred in the judgment agreed that the Court's inability to provide "anything more than today's meager guidance" regarding the meaning of RICO's "pattern" requirement "bodes ill for the day when" a vagueness challenge is presented, *id.* at 256.[6]

Today, all four Justices who concurred in the judgment in *H.J. Inc.* remain on the Court, joined by four post-*H.J. Inc.* appointees and by JUSTICE STEVENS, who in

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[6] The Court first expressed its concern with RICO's "pattern" requirement in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 500 (1985), noting "the failure of Congress and the courts to develop a meaningful concept of 'pattern.' "

RICO's "enterprise" requirement has also proved impermissibly vague, as the case under review demonstrates. The district court originally dismissed the Estate's RICO claims against Steinberg "without leave to replead," *Bingham* v. *Zolt*, 683 F. Supp. 965, 971 (S.D.N.Y. 1988); App. to Pet. for Cert. 61a, stating that "[t]he Court is not persuaded that the fraudulent diversion of specific – albeit income-producing – assets without the threat of continuing criminal activity supports the existence of a RICO enterprise . . . ," *id.* at 970; App. to Pet. for Cert. 59a. Later, however, the district court reconsidered its ruling and allowed the Estate's RICO claims against Steinberg to go to trial.

As the Court explained in *Kolender* v. *Lawson*, 461 U.S. 352 (1983):

> "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary enforcement." *Id.* at 357.

Because RICO is a penal statute, it must meet the void-for-vagueness criteria described in *Kolender* even when employed in a civil action. *See FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954).

Steinberg intends to show the Court, should review be granted, that RICO's "pattern" and "enterprise" requirements are unconstitutionally vague. *See, e.g., Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939) (holding unconstitutional statute that was similarly vague).

In sum, the Court should grant this petition to resolve the important question that the four Justices who concurred in the judgment in *H.J. Inc.* raised: whether RICO's "pattern" requirement is unconstitutionally vague. The Court should also grant review to determine whether RICO's "enterprise" requirement is unconstitutionally vague.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 621, 622 – August Term, 1994

(Argued December 12, 1994
Decided September 28, 1995)

Docket Nos. 93-7695, 93-7709

J. REID BINGHAM, as Ancillary Administrator of the ESTATE OF ROBERT NESTA MARLEY,

Plaintiff-Appellee,

-v.-

MARVIN ZOLT; ZOLT & LOOMIS, P.C., and DAVID J. STEINBERG,

Defendants-Appellants,

GREENSTEIN, GORELICK, PRICE, SILVERMAN & LAVESON,

Defendant,

BLUESTEIN, RUTSTEIN & MIRARCHI, P.C.; MARTIN OLINER; MARTIN OLINER, P.C. and COUDERT BROTHERS,

Defendants-Third-Party-Plaintiffs,

RITA MARLEY and MUTUAL SECURITY MERCHANT BANK AND TRUST COMPANY,

Third-Party-Defendants.

Before:

NEWMAN, *Chief Judge*,
OAKES and CARDAMONE, *Circuit Judges*.

Defendants appeal from an amended judgment entered upon a jury verdict finding them guilty of common law fraud, breach of fiduciary duty, and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) under 18 U.S.C. § 1962(b), (c) and (d).

Affirmed.

RAY BECKERMAN, New York, New York (Gallet Dreyer & Berkey, New York, New York, of counsel), *for Appellants Marvin Zolt and Zolt & Loomis, P.C.*

JEREMY D. MISHKIN, Philadelphia, Pennsylvania (Howard J. Bashman, Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pennsylvania, of counsel), *for Appellant David J. Steinberg*.

ROBERT W. BRUNDIGE, JR., New York, New York (Jeffrey R. Coleman, Cheryl B. Schreiber, Seth D. Rothman, Hughes Hubbard & Reed, New York, New York, of counsel), *for Appellee*.

CARDAMONE, *Circuit Judge*:

Defendants Marvin Zolt, Zolt and Loomis, P.C. (collectively Zolt), and David Steinberg appeal from an amended judgment entered July 21, 1993 in the United States District Court for the Southern District of New

York (Conboy, J.) that, after a jury trial, found defendants liable in damages to the estate of Robert Nesta (Bob) Marley for fraud, breach of fiduciary duty, and violations of civil RICO under 18 U.S.C. § 1962(b), (c), and (d) (1988). Bob Marley was the Jamaican singer-songwriter responsible for bringing the reggae sound to the world and, to his fans, still is reggae music. Even today, 15 years after his death from brain cancer, he continues to be the world's best-selling reggae artist. He used his music as a vehicle to spread global messages of peace, brotherhood, African unity, and international morality. For his contributions to ending political violence in Jamaica, he was awarded in 1978 the United Nations Medal of Peace. It is particularly revealing of the perversity of human nature that such a person's estate be plundered by the perfidy of his closest advisors. It is that duplicity that gave rise to the litigation before us on this appeal.

FACTS

A. *Background*

Robert Nesta (Bob) Marley died intestate on March 11, 1981 survived by his wife Rita and 11 children. Under Jamaican intestacy law his wife was entitled to 10 percent of his estate outright and held a life interest in another 45 percent of it. Marley's 11 children were entitled to equal shares of the remaining 45 percent outright, plus a remainder interest in Rita's 45 percent life estate.

For five years from the time of Marley's death in 1981 until 1986, defendants David Steinberg, Marley's attorney, and Marvin Zolt, Marley's accountant, with the aid of his wife, Rita Marley, developed and implemented

numerous schemes that allegedly diverted foreign music assets and royalty income from Marley's estate to themselves. Defendants argued that their activities in creating new corporations and transferring funds from the estate to a chain of international companies were aimed at minimizing the estate's tax liabilities, leaving more to be distributed to Marley's beneficiaries.

B. *The Principal Schemes*

Of the numerous schemes by which defendants diverted estate assets and income, only the four principal ones will be outlined.

1. *Share Transfer Scheme.* Before Bob Marley died he, individually, and his three wholly-owned British Virgin Islands companies (BVI Companies), received royalty payments and income from various recording and publishing contracts. The BVI Companies as personal assets of Marley would have become estate property upon his death, resulting in the estate's receipt of all of the royalty income due him. But defendants advised Rita Marley to forge her husband's signature on three documents transferring the ownership of the BVI Companies from Bob Marley to herself. The documents were pre-dated to 1978 to make it appear that Marley had made these transfers during his lifetime, thereby excluding them from estate property. Steinberg signed the documents as a witness.

Ownership of the BVI Companies was then transferred to a Netherlands Antilles company known as Music Publishing Companies of Bob Marley, N.V. (the NV or Netherlands Antilles Company), whose sole shareholder was Rita Marley. Later the BVI Companies were

liquidated, their royalty-producing assets transferred to the NV Company and then, in turn, to a wholly-owned Dutch subsidiary, Bob Marley Music B.V. (the BV or Dutch Company). The result was that various amounts of royalty and other income rightfully belonging to the BVI Companies – and indirectly to the estate – were funnelled between bank accounts in the names of Steinberg, the NV Company, and the BV Company and subsequently transferred into Rita Marley's personal account or into special escrow accounts set up in Zolt's name.

2. *The Almo Scheme.* This scheme is set forth in a letter dated December 29, 1981. It involved a signed agreement between Zolt, Steinberg, and Rita Marley not to report to the estate Bob Marley's personal share of royalty checks received from Almo Music, a music administration company for Bob Marley's song publishing activities. These royalty payments totalled about $1 million for the two years from the date of Marley's death until 1983.

3. *The Island Assignment Scheme.* Under this plan Rita Marley forged her late husband's signature on an assignment, again signed by Steinberg as a witness. The document, backdated to August 13, 1980, assigned Bob Marley's individual rights under contracts with Island Records to one of the BVI Companies, causing the royalties produced under those contracts to be transferred to the bank accounts of the NV Company and BV Company mentioned above, rather than to the estate.

4. *The Rondor Scheme.* This scheme was accomplished by assigning the assets of Tuff-Gong Productions Ltd. (Tuff-Gong Delaware), a company individually

owned by Bob Marley that would have been estate property, to one of the BVI Companies. The assignment was dated as of November 30, 1980 but actually made after Bob Marley's death. It stated that the assets were transferred for the alleged consideration of $100,000, although the copyrights at issue generated millions in royalties from 1980 to 1985.

C. *The Concealment*

On December 17, 1981 letters of administration for Marley's estate were issued to co-trustees Rita Marley, Mutual Security Merchant Bank & Trust Company, a Jamaican bank, and George Desnoes, a prominent Jamaican attorney. Mutual Security, acting through George Louis Byles, its managing director, had primary responsibility for administering the estate. At a meeting to examine the estate's assets and liabilities, Steinberg told Byles that a large portion of Bob Marley's assets had been transferred to others before his death. At a later meeting on January 4, 1982 where Byles, Rita Marley, Steinberg, and Zolt were present, Steinberg specifically indicated that the BVI Companies were not part of the estate because they had been transferred to Rita Marley before Bob Marley's death.

On June 14, 1982 Byles called another meeting in Jamaica, attended by Zolt, Steinberg, Desnoes, and Rita Marley. When Byles again inquired about the ownership of the BVI Companies, Steinberg gave him copies of the forged share transfers, dated June 6, 1978, showing that Bob Marley transferred his shares in the companies to Rita Marley before his death. Steinberg and Zolt also

represented to Byles that the assets of Tuff-Gong Delaware barely exceeded that company's liabilities.

Defendants further led Byles to believe that Bob Marley had assigned his contract rights with Island Records to one of the BVI Companies. In accounting to the estate over the next six years, defendants reported only minimal amounts of royalty proceeds, failing to remit to the estate millions of dollars they had received and transferred to bank accounts of the NV Company, the BV Company, Rita Marley, Steinberg, and Zolt.

D. *The Suit*

On December 10, 1986 Mutual Security, in its capacity as administrator of the estate, filed the instant case against Zolt, Steinberg, and their affiliated firms. Rita Marley was not named as a defendant, although there is an action by the estate pending against her in Jamaica and she was subsequently named as a third-party defendant in the instant case. In March of 1987 J. Reid Bingham, having been appointed ancillary administrator of the estate in New York, was substituted as the plaintiff in the instant litigation. Additional defendants were named, including several other law firms from which Steinberg had leased offices, a tax lawyer Steinberg and Zolt had hired, and the firm where the tax lawyer practiced law (collectively "other law firms"). The suit alleged violations under the Racketeer Influenced and Corrupt Organizations Act (RICO), specifically 18 U.S.C. § 1962, and causes of action for conversion, fraud, breach of fiduciary duty, negligence, and gross negligence for improperly diverting the estate's assets.

were time-barred, the estate lacked standing, the jury's verdict was inconsistent, the damages awards were improper, and attorney's fees were improperly awarded under RICO. Several additional issues are raised. All will be addressed in order.

I RICO Claims Not Time-Barred

Analysis turns first to the statute of limitations. As detailed above, defendants were found liable for funnelling millions of dollars in royalty payments out of the estate through various schemes. Companies and contract rights were fraudulently transferred out of the estate in order to facilitate the diversion of many royalty checks into defendants' bank accounts. The jury found the estate had actual knowledge of defendants' wrongful acts more than four years prior to suit, but that it had suffered $1,050,000 in injuries – of which $800,000 were allocated as RICO injuries – *after* December 31, 1982. The district court ruled that the estate's previous knowledge of the underlying wrongful acts did not bar its action as to these RICO injuries under the "separate accrual" rule of *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989).

No specific limitations period is provided in the RICO statute. The Supreme Court announced a uniform four-year limitations period for civil RICO actions, but expressly declined to decide the question of when such civil RICO actions accrue. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156-57 (1987). The result has been a split among the circuits generating as many as half a dozen conflicting accrual rules. *See*

generally Mary S. Humes, Note, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399 (1990); Paul B. O'Neill, Note, *"Mother of Mercy, Is This the Beginning of RICO?": The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. Rev. 172 (1990); *see also In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litig.*, 850 F. Supp. 1105, 1116-17 and 1117 n.8 (S.D.N.Y. 1993) (summarizing the conflict). A civil RICO action has been held to accrue upon, *inter alia*, the commission of the last predicate act, *see, e.g., County of Cook v. Berger*, 648 F. Supp. 433 (N.D. Ill. 1986), plaintiff's discovery of the last predicate act, *see, e.g., Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988), or plaintiff's discovery of his resulting injuries, *see, e.g., La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254 (5th Cir. 1986).

In this Circuit we recognize a "separate accrual" rule under which a new claim accrues, triggering a new four-year limitations period, each time plaintiff discovers, or should have discovered, a new injury caused by the predicate RICO violations. *See Cruden v. Bank of New York*, 957 F.2d 961, 977 (2d Cir. 1992); *Bankers Trust*, 859 F.2d at 1102; *accord State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987). In *Bankers Trust*, defendants, officers of a bankrupt corporation, fraudulently concealed assets of the bankruptcy estate through a complicated series of transactions, and instituted frivolous lawsuits against plaintiffs to prevent them from recovering a legitimate debt. *See* 859 F.2d at 1098-99. Plaintiffs incurred various legal fees and expenses over time, besides the loss of the debt itself. (The loss of debt claim, although not time-barred, was dismissed without prejudice because its amount was speculative. *See id.* at

1105-06.) Noting that in enacting RICO, Congress had in mind the possibility of "multiple and independent [injuries] that occur over a broad span of time," we held that a rule permitting a new cause of action to accrue with each independent injury was "[t]he logical end result." *Id.* at 1103.

A necessary corollary of the separate accrual rule is that plaintiff may only recover for injuries discovered or discoverable within four years of the time suit is brought. *See id.* at 1104-05. As long as separate and independent injuries continue to flow from the underlying RICO violations – regardless of when those violations occurred – plaintiff may wait indefinitely to sue, but may then win compensation only for injuries discovered or discoverable within the four-year "window" before suit was filed, together, of course, with any provable future damages. *See Bankers Trust,* 859 F.2d at 1103.

In holding that the estate could recover from defendants for RICO injuries occurring after December 31, 1982, the district court correctly applied our separate accrual rule. Defendants point to one of our recent decisions, issued after trial was concluded in this case, which they believe indicates the district court was in error. *See Long Island Lighting Co. v. Imo Indus., Inc.*, 6 F.3d 876, 887 (2d Cir. 1993) (*LILCO*). In *LILCO*, plaintiff purchased generators in 1973, received them in 1976 and 1977, but kept them in storage until 1981. When plaintiff began testing and installation the generator crankshafts failed, resulting in massive repair, replacement and financing costs. *See id.* at 879-81. We affirmed the district court's holding that because LILCO knew or should have known the crankshafts were defective no later than 1977, all of its civil RICO claims were time-barred when it brought suit

in 1985. *See id.* at 887. Defendants assert that *LILCO* conclusively demonstrates the civil RICO limitations period is not automatically triggered each time new injuries flow from predicate wrongful acts.

Defendants misapprehend the import of *LILCO*; it is not a multiple-injury case in the sense of *Bankers Trust*. The financial losses suffered by LILCO after 1981 were not "new *and independent* injur[ies]," *Bankers Trust*, 859 F.2d at 1103 (emphasis added), that would cause the accrual of a new limitations period. LILCO's civil RICO cause of action accrued when it learned, or should have learned, that the generators were defective – that is, that it had incurred the actionable injuries of receiving defective generators in derogation of its contract and warranty rights. The additional financial losses that resulted from LILCO's decision to use the defective equipment were not independent from that original injury. *Accord Glessner v. Kenny*, 952 F.2d 702, 708 (3d Cir. 1991) (under injury-discovery rule, costs of continuing to service and ultimately replacing defective oil furnace "could not be considered a 'further injury' sufficient to revive the RICO cause of action") (citing *Bankers Trust*).

LILCO's post-1981 losses did not revive its civil RICO claim because non-independent injuries will not cause a new limitations period to accrue. Had LILCO brought timely suit in 1977, before the generators were installed, its recovery would have been limited to the cost of replacing the equipment, plus provable consequential damages, such as loss of business through delay. It could not have recovered all the expenses it actually incurred after 1981 for installation, repair, and damage caused by the breakdown of the defective crankshafts. By deciding to install,

use, and repair the defective equipment, LILCO increased its losses attributable to the underlying injuries it suffered when the defendant delivered the defective generators. But those newly-incurred expenses were not sufficiently independent from the original injuries to start a new civil RICO limitations period running, nor would it make sense to give plaintiffs the power to restart the limitations clock in this way.

To reach the conclusion that plaintiff's later losses did not restart the civil RICO clock, *LILCO* reasoned that all the damage done to the plaintiff could be clearly ascertained at the time it knew or should have known it purchased defective goods: "LILCO's injury was not in any sense speculative at that juncture, and its RICO claims accrued at that time." *LILCO*, 6 F.3d at 887. Thus, the injury to LILCO was complete before it installed and used the faulty generators – there was no subsequent new injury to trigger a new limitations period. The speculative-versus-determinable language corresponds in practice to the underlying notion that a new and independent injury must occur to give rise to a separately-accruing civil RICO action under the rule of *Bankers Trust*. It does not mean, as defendants suggest, that newly-incurred injuries *never* restart the RICO clock.

The speculativeness language of *LILCO* was taken from *Cruden*, 957 F.2d 961, a civil RICO accrual case occurring in a single-injury context. In *Cruden*, plaintiff debenture holders brought a civil RICO action against the issuer premised on fraud. Although the fraudulent acts alleged had occurred more than four years prior to suit, we held the RICO claim timely because it did not accrue until the debentures went into default – that is, until an

injury occurred. *See id.* at 977-78. Plaintiffs had no cause of action before default, since up until that time the possibility of damages was " 'speculative [and] their amount and nature unprovable.' " *Id.* at 977 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971)). Upon default, however, the full value of the debentures became due immediately and the cause of action accrued. What would have been a stream of future income absent default became a single injury upon default. *Cruden* thus addresses the accrual of a civil RICO action based on a single injury rather than several successive injuries. Although the speculativeness rule might be helpful in analyzing whether each of a series of injuries is sufficiently ripe for a RICO cause of action to accrue, that rule does not determine whether successive injuries are sufficiently independent to cause re-accrual.

We think the instant case is closer factually to *Bankers Trust* than to either *LILCO* or *Cruden*, as it involves a continuing series of fraudulent actions undertaken to divert and conceal assets and income. A variety of schemes were employed, involving frequent misappropriations of discrete amounts of money from different sources, such as various royalty payments owing to Marley's BVI Companies and payments from Almo Music. Defendants were found guilty of funnelling royalty checks out of the estate from the time of Marley's death to the commencement of this litigation, and each illegal diversion constituted a new and independent legally cognizable injury to the estate. As a consequence, with each diversion a new civil RICO cause of action accrued, with

a corresponding four-year limitations period, and plaintiff's action is timely with respect to all diversions occurring within four years of suit. We hold therefore that the estate's RICO action against defendants was not barred by the statute of limitations.

We note parenthetically there are no future injuries at issue in this case: the companies and contract rights generating future income streams have been restored to the estate. Were there, under somewhat different facts, a prospect of continuing diversions, plaintiff would of course have been entitled to recover such future damages as were provable. *See Bankers Trust*, 859 F.2d at 1103. We need not decide, in the case at hand, whether a plaintiff would be prohibited from bringing a series of suits when future damages are provable in an earlier action, but plaintiff elects not to seek such damages until a later time.

II The Estate's Standing

Defendants next contend the estate lacked standing to assert causes of action belonging to the diverted corporations. Their argument is based on the general principle that a shareholder cannot sue in his individual capacity to redress wrongs inflicted upon a corporation in which he holds stock. *See, e.g., Manson v. Stacescu*, 11 F.3d 1127, 1131 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 292 (1994); *Green v. Victor Talking Mach. Co.*, 24 F.2d 378, 380-81 (2d Cir.), *cert. denied*, 278 U.S. 602 (1928).

When the claim is that corporate property has been removed from the corporation, it is the corporation – having an independent legal identity – that must seek, on

its own or derivatively, to redress its injury. The shareholder in such a case is injured only as a result of the injury to another, *i.e.*, the corporation, and therefore generally lacks standing. On the other hand, where the individual owns property – cash, real estate, or shares of stock – and that property is stolen, the individual suffers an injury personal to him and no other. In such a case it is only the individual that may properly seek to redress his injury.

For the most part defendants' contention rests on a mischaracterization of the causes of action alleged. This mischaracterization is most clearly seen with respect to the "Almo Scheme" and the "Island Assignment Scheme." In each case the contract rights and royalty checks diverted had been the personal property of Bob Marley. This property would have then passed to the estate upon his death. Defendants' schemes shifted these rights from Bob Marley's estate to themselves. There is no doubt that the estate has standing to assert claims based on these schemes.

While seemingly more complex, the "Share Transfer Scheme" is conceptually identical to the two other schemes. Plaintiffs' claim is not so much that assets were stolen from the BVI Companies, but rather that the BVI Companies themselves were stolen from the estate. The BVI Companies were wholly-owned by Bob Marley and, again, would have become estate property upon his death. Defendants, by means of Rita Marley's forgery of Bob Marley's signature, transferred ownership of the BVI Companies out of the estate. Hence, it is the estate, and not the companies themselves, that has suffered an injury.

The injury is complicated by defendants' subsequent liquidation of the BVI Companies, but this fact does not alter the underlying analysis that the estate was deprived of property – the BVI Companies – that it rightfully owned.

Defendants' characterization does hold true, however, for the so-called "Rondor Scheme." That scheme involved the transfer of assets from Bob Marley's wholly-owned Tuff-Gong Delaware to one of the BVI Companies. Thus, it was Tuff-Gong Delaware that suffered an injury and not the estate. The estate's only injury is as the sole shareholder of that corporation. Nonetheless, to the extent plaintiffs' [sic] claims pertained to this scheme, it has standing to sue.

We have recognized an equitable exception in estate cases – disregarding the separate status of the estate-shareholder and the corporation "to prevent fraud or to achieve equity." *Musico v. Champion Credit Corp.*, 764 F.2d 102, 108-10 (2d Cir. 1985) (internal quotes omitted). We have also permitted a shareholder to sue directly when the defendant owes a direct legal duty to the shareholder. *See Ceribelli v. Elghanayan*, 990 F.2d 62, 64 (2d Cir. 1993). Zolt and Steinberg, Bob Marley's accountant and lawyer, owed fiduciary duties directly to him and his estate. Their actions in diverting estate assets and income breached that duty. Consequently, even in the schemes where the estate was injured only as a shareholder, defendants' breaches of their fiduciary duty as well as equitable considerations confer standing on plaintiff in this action.

III No Need to Reconcile Jury Verdict

Zolt maintains, as a third challenge, that the district court erred in denying his counsel's request to submit two additional special verdict questions to the jury to clarify its allegedly inconsistent findings that the estate had actual knowledge of defendants' wrongful acts and that plaintiff justifiably relied on defendants' false representations. Counsel's two suggested questions were: (1) "State whether the estate had actual knowledge of the wrongful acts of defendant Marvin Zolt prior to December 10, 1982" and (2) "If the answer to the foregoing is 'yes,' state when the estate acquired actual knowledge of the wrongful acts of Marvin Zolt." Zolt reasons these questions were essential because if at all pertinent times the estate had actual knowledge of defendants' wrongdoing, plaintiff would not be able to satisfy the required element of justifiable reliance of defendants' representations to establish a claim for fraud.

Where there is an alleged inconsistency in a jury's verdict, the trial court is obliged to harmonize the dissonance, if such is fairly possible. *See Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 891 (2d Cir. 1988); *see also Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962) ("where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way").

It is our task in reviewing the record to ascertain whether the trial court's reconciliation of the apparently inconsistent verdict is a reasonable reading of the record. *See Royal Cup, Inc. v. Jenkins Coffee Serv., Inc.*, 898 F.2d

1514, 1519 (11th Cir. 1990). According to the jury's determination, the estate had actual knowledge of defendants' misconduct by December 10, 1982, four years before suit was filed. Hence, from that point forward no fraud claim could successfully lie because plaintiff would not be able to prove that it justifiably relied on defendants' false representations. However, from June 3, 1981, the latest date at which Mutual Security first became involved in the estate, until December 10, 1982 there is an 18-month window of opportunity when defendants may have committed fraud unknown to plaintiff. From the recitation of the facts we know that at least several meetings were held where defendants gave misleading and untruthful statements to bank officials regarding the status of the assets in Marley's estate. Thus, a cause of action based on fraud could lie because the estate may have relied justifiably upon defendants' misrepresentations during that 18-month period.

Further, the district court properly instructed the jury on the elements of plaintiffs' [sic] causes of action, including the fraud cause, against defendants. There is a strong presumption that the jury in reaching its verdict complied with those instructions. *See United States v. Casamento*, 887 F.2d 1141, 1151 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990). A jury's verdict reached after proper instructions must be upheld where there is a reasonable explanation for the jury's seemingly inconsistent answers. In the case at bar, a plausible explanation of the jury's verdict existed – the fraud occurred prior to the estate's actual knowledge of defendants' wrongdoing. As a consequence, the district court's reconciliation was a fair explanation that eliminated the alleged inconsistency.

It was not therefore an abuse of discretion for the court to refuse to submit counsel's proposed additional questions to the jury.

IV Damages Awards

A. *Compensatory Damages Properly Determined*

Steinberg maintains, as a fourth point, that the district court wrongly formulated the measure of damages suffered by the estate. He avers it was error to accept plaintiff's proposed measure of damages, *i.e.*, that it could recover as compensation all the money that went to the estate's "offshore" companies and bank accounts regardless of where the money eventually ended up. According to Steinberg, the estate suffered no loss because the funds from the estate's "offshore" companies and its bank accounts were distributed to estate beneficiaries who were entitled to receive them or were used to pay for the estate's legitimate expenses.

As "the measure of damages upon which the factual computation is based is a question of law," this question is subject to *de novo* review. *Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1009 (2d Cir. 1991) (internal quotes omitted). Defendant's argument is fundamentally flawed, to the extent that he incorrectly assumes that the beneficiaries of the estate are indistinguishable from the estate itself. An estate, of course, is an entity separate and distinct from its beneficiaries. *See In re Dolcater*, 106 F.2d 30, 31 (2d Cir. 1939) (in suit to recover funds fraudulently extracted from an estate, any recovery will be for the benefit of the estate; such a suit may only be brought by the estate, unless

should not have been submitted, a general verdict . . . cannot stand.").

This conclusion misses the mark. The jury did not return a general verdict, leaving the court uncertain as to liability on plaintiff's other claims. Rather, its special verdict found defendants liable on each common law claim. Plaintiff is entitled to recover its full measure of compensatory damages, despite the dismissal of certain common law claims, because each claim presented an alternative theory of liability based upon the same set of facts, the same series of acts, and the same injuries caused by the same actors. Whether or not a defendant is liable to a plaintiff under one or many theories of liability does not affect the damages award because the amount of compensatory damages awarded is not dependent on the number of theories that plaintiff alleges and under which it may recover. Rather, the amount of damages depends on the extent of the injury suffered. *See Clark v. Taylor*, 710 F.2d 4, 8 (1st Cir. 1983).

C. *Punitive Damages Award*

Steinberg asserts, in addition, it was error not to vacate the punitive damages award once the district court agreed that the RICO cause of action could not support punitive damages. The district court reduced the punitive damages award from $1 million to $250,000 because the jury had been asked to consider an award of punitive damages on the RICO cause of action. Steinberg contends that they should have been dismissed altogether, since it was "impossible to discern on which claims the jury based its award of punitive damages." *Bingham*, 823

F. Supp. at 1135. He further states that the punitive damages award should have been dismissed since two of the common law claims on which punitive damages were potentially founded were dismissed as time-barred.

We have expressed the view that aggregate punitive damages awards are preferable, due to the risk that "separate awards for each component of misconduct might unduly increase the amount of the total award." *King v. Macri*, 993 F.2d 294, 299 (2d Cir. 1993). Faced with such an aggregate award, the district court lowered it significantly to an amount it considered reasonable and fair. Thus, our inquiry is limited simply to whether the award is so high "as to shock the judicial conscience and constitute a denial of justice." *O'Neill v. Krzeminski*, 839 F.2d 9, 13 (2d Cir. 1988) (internal quotes omitted). In light of the facts and circumstances of this case, we think the award completely reasonable and therefore see no reason to direct a new trial on this issue.

V Attorney's Fees Award Proper

Defendants challenge, as their fifth point, on several grounds plaintiff's award of $3,029,428.46 in attorney's fees and disbursements under RICO. Zolt tells us that attorney's fees under RICO as a matter of substantive law are subject to the parties' rights to discovery, an evidentiary hearing, and a jury trial. Steinberg believes the estate's request for fees was reduced an inadequate 15 percent based upon the unreasonableness of certain expenses. He thinks it should have been reduced much more substantially to reflect the estate's limited success at trial. This argument is based on the fact that the jury

awarded only a small part of the damages sought by plaintiff, three of plaintiff's six charges were dismissed as time-barred, and the estate prevailed against only three of eight defendants.

It was not error to reject Zolt's request for a jury trial, discovery, and an evidentiary hearing. It is the trial court, not the jury, that has the responsibility of determining attorney's fees awards pursuant to statute. *See Gagne v. Town of Enfield*, 734 F.2d 902, 904 (2d Cir. 1984) (attorney's fees under 42 U.S.C. § 1988); *United States Football League v. National Football League*, 704 F. Supp. 474 (S.D.N.Y.) (attorney's fees under Clayton Act), *aff'd*, 887 F.2d 400 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990). Further, Zolt's demands do not mesh with the policy that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Reliance on *F.H. Krear & Co. v. Nineteen Named Trustees*, 776 F.2d 1563, 1564 (2d Cir. 1985) (per curiam), is misplaced. *Krear* is inapt as it dealt with attorney's fees that were a contractually stipulated element of consequential damages, not attorney's fees pursuant to statute. Thus, no basis exists here for a jury trial to determine attorney's fees awarded pursuant to 18 U.S.C. § 1964(c).

With respect to amount, plaintiff submitted a detailed accounting of over 500 pages containing time records for the attorneys, summer clerk, and paralegal who worked on this case. The records specified the name of each individual, the date, the amount of time expended, the hourly rate, and a description of the work performed. This information was supported by an affidavit provided by plaintiff's counsel. After reviewing those records, the district court found itself fully satisfied with the detailed

documentation and able to determine an appropriate award without any additional discovery or evidentiary hearings. *See Bingham*, 823 F. Supp. at 1137 n.9.

Steinberg's challenge to the award based on plaintiff's limited success at trial also lacks merit. In *Hensley* the Supreme Court stated, "[t]he result is what matters." *See* 461 U.S. at 435. Although plaintiff did not prevail on all of its claims and the jury did not find all the defendants guilty, the plaintiff obtained a jury verdict and a judgment against defendants. It won the case. We see no abuse of discretion in the award of attorney's fees.

VI Remaining Issues

Zolt makes a number of accusations attempting to show that the trial was conducted in an improper and prejudicial manner. For instance, he declares that plaintiff's counsel was unfairly allowed to ask him leading questions, that he was instructed at times by the trial judge to give yes or no answers, that he was threatened with contempt, that he was questioned by the trial judge in an inappropriate and unfair way, that he was prejudiced by the interruption in his testimony by two days of testimony by Steinberg, who responded to questions by invoking the Fifth Amendment, and that the jury was allowed to infer that Zolt was lying by his failure to remember events.

A careful review of the record shows Zolt's characterization of the trial wholly lacking in merit. It is clear from the trial transcript that Zolt was a hostile witness, making leading questions by plaintiff's counsel entirely proper.

See Fed. R. Evid. 611(c). He was threatened with contempt, out of the presence of the jury, for constantly responding beyond the questions asked, in order to blame his co-defendants. In a sidebar, the trial judge did note that the jury could infer Zolt was lying. However, in context, it is clear the judge meant that the jury could credit documentary evidence where Zolt claimed not to remember. More importantly, at no time did the judge instruct the jury that a witness's inability to recall constituted evidence of the facts asserted in an attorney's question. All of Zolt's contentions are factually baseless and, further, go to the discretionary conduct of a trial by the district judge. *See Boyle v. Revici*, 961 F.2d 1060, 1064 (2d Cir. 1992). We are unable to find any abuse of that discretion and discern no unfairness in the conduct of the trial.

Finally, Steinberg urges that RICO's pattern and enterprise requirements are unconstitutionally vague as applied to himself. His assertion relies on Justice Scalia's concurring opinion in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251-56 (1989), criticizing the Supreme Court's inability to define RICO's pattern and enterprise requirement. We have consistently held that RICO's pattern and enterprise requirements are not unconstitutionally vague. *See United States v. Coiro*, 922 F.2d 1008, 1017 (2d Cir.), *cert. denied*, 501 U.S. 1217 (1991); *United States v. Coonan*, 938 F.2d 1553, 1561-62 (2d Cir. 1991), *cert. denied*, 503 U.S. 941 (1992).

CONCLUSION

Accordingly, for all the reasons stated, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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J. REID BINGHAM, as Ancillary Administrator of the ESTATE OF ROBERT NESTA MARLEY,

Plaintiff,

-against-

MARVIN ZOLT; ZOLT & LOOMIS, P.C.; DAVID J. STEINBERG; BLUESTEIN, RUTSTEIN & MIRARCHI, P.C.; GREENSTEIN, GORELICK, PRICE, SILVERMAN & LAVESON; MARTIN OLINER; MARTIN OLINER, P.C.; and COUDERT BROTHERS,

Defendants.

86 Civ. 9477 (KC)

OPINION
AND
ORDER

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COUDERT BROTHERS; MARTIN OLINER; MARTIN OLINER, P.C.; and BLUESTEIN, RUTSTEIN & MIRARCHI, P.C.,

Third-Party Plaintiffs,

-against-

RITA MARLEY and MUTUAL SECURITY MERCHANT BANK AND TRUST COMPANY,

Third-Party Defendants.

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KENNETH CONBOY, DISTRICT JUDGE:

This case was tried over a period of twelve weeks before a jury, which returned a verdict in favor of the plaintiff, J. Reid Bingham, and against two of the defendants, Marvin Zolt and David J. Steinberg. Currently before the Court are several post-trial motions from different parties to the litigation. This Order addresses the motions of David J. Steinberg and Marvin Zolt, the plaintiff's request to order the registration of this Judgment in the district of Pennsylvania, and the plaintiff's application for attorneys' fees and disbursements.[1]

A. Statute of Limitations

1. RICO Claims:

Defendants claim that plaintiff's RICO claims are barred by the statute of limitations because the jury found that the Estate had actual knowledge of the defendants' wrongful acts by December 10, 1982. Defendants' argument, however, ignores the fact that under applicable Second Circuit law, the Estate's RICO claims are timely as to all RICO injuries suffered by the Estate within the four-year limitation period. *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988) ("a plaintiff may sue for any

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[1] In addition, the Court observes that defendant Marvin Zolt, in his "Supplemental Notice of Motion," filed on January 21, 1993, incorporated by reference the "grounds set forth by defendant David Steinberg in his notice of motion dated January 19, 1993." Marvin Zolt's "Supplemental Notice of Motion," Jan. 19, 1993 at 1-2. The Court rejects plaintiff's argument that Mr. Zolt's motion was submitted "belatedly." Plaintiff seems to have overlooked Fed. R. Civ. P. 6(a), which provides that when computing time periods of less than eleven days, intermediate Saturdays, Sundays, and legal holidays are excluded.

injury he discovers or should have discovered within four years of the commencement of his suit, regardless when the RICO violation causing such injury occurred." *Id.* at 1103), *cert. denied*, 490 U.S. 1007 (1989). Since the jury expressly found that all of the RICO damages occurred after December 31, 1982, the Court finds that all of the separate RICO injuries found by the jury occurred within four years of the commencement of the suit on December 10, 1986.

The Court observes that the fact that the plaintiff had actual knowledge of the wrongful acts by December 10, 1982 does not bar the RICO claims. The Second Circuit has made clear that the separate accrual rule is discrete from the issue of plaintiff's knowledge of the underlying RICO violations. For example, in *Bankers Trust*, the Court held that plaintiff could "recover for any injury it discovered or should have discovered on or after August 24, 1978" [four years prior to the suit], despite the fact that plaintiff first became aware of defendants' fraud in September 1976. 859 F.2d at 1099, 1105. *See also Center Cadillac, Inc. v. Bank Leumi Trust Co. of New York*, 808 F. Supp. 213 (S.D.N.Y. 1992) ("because a civil RICO action to recover damages for an injury does not exist until that injury has been suffered, Plaintiffs have an action for each injury sustained after May 14, 1987, notwithstanding the fact that Plaintiffs already knew of Defendants' fraudulent activity and might have anticipated further harm. Plaintiffs sustained actionable injury every time they lost money as a result of Defendants' RICO scheme." *Id.* at

226). Accordingly, the Court finds that the plaintiff's RICO claims are not barred by the statute of limitations.[2]

2. Common Law Claims:

Defendants also maintain that plaintiff's common law claims for fraud and breach of fiduciary duty are barred by the applicable statute of limitations.[3] We disagree. We have already held that New York law governs the resolution of this dispute, and that, accordingly, the six-year New York statute of limitations applies to plaintiff's fraud and breach of fiduciary claims. *See* Trial Tr.

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[2] In his "Memorandum of Law of Defendants Marvin Zolt and Zolt and Loomis, P.C., in Support of Motion Pursuant to Rules 50, 59, and 62," filed Jan. 23, 1993, Mr. Zolt argues that the Court must dismiss the RICO claims on the grounds that the defendants' wrongful acts, the injury to the estate, and plaintiff's awareness of the wrongful acts all occurred more than four years prior to the commencement of the lawsuit (before December 10, 1982). We disagree. As mentioned above, the key dates are when each separate injury arose, not when the wrongful acts occurred or when the plaintiff became aware of the wrongful acts. The jury explicitly found that the plaintiff's injuries all arose within four years of the commencement of the lawsuit. We do not believe that these injuries were mere continuations of an injury that had occurred outside the four-year statute of limitations. Measuring the RICO claims by the dates when the injuries arose, the Court finds that the RICO claims are timely as to both defendants.

[3] Defendants maintain that all of plaintiff's common law claims are barred by the statute of limitations. However, neither defendant specifically mentions the conversion, negligence, or gross negligence claims. In the absence of a reasoned argument with respect to these claims, and, indeed, in the absence of any argument at all, the Court will not address these issues.

8015-16, 8499-8500. We do not believe that either the fraud or breach of fiduciary duty claim is barred by its six-year statute of limitations.

Defendants also argue that plaintiff's "actual knowledge" of defendants' wrongful acts by December 10, 1982 negates plaintiff's RICO and fraud claims. We have already rejected this argument with respect to the RICO claims and do so here for the fraud claim as well. The Court recognizes that justifiable reliance is an essential element of a fraud claim (*See* Jury Charge, Instruction No. 64, at 71), and that there is an inconsistency between a finding that the plaintiff had actual knowledge of defendants' wrongdoing and that plaintiff justifiably relied on a false representation made by defendants. However, the Court also recognizes that the jury found that plaintiff had actual knowledge of defendants' wrongdoing by December 10, 1982, four years prior to the commencement of the suit, and there remains a two-year window in which defendants could have committed the fraud unbeknownst to the plaintiff.

Defendants argue that since the jury found that the plaintiff had actual knowledge of defendants' wrongdoing on the earliest date upon which they could have, it is very possible that the plaintiff acquired actual knowledge of defendants' wrongdoing well before December 10, 1982, and that therefore there was never a justifiable reliance by the plaintiff within the applicable six-year statute of limitations for fraud. We disagree. Where there is an alleged inconsistency in the jury's verdict, " '[i]t is the duty of the court to attempt to harmonize the answers, if it is possible under a fair reading of them.' " *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884,

891 (2d Cir. 1988), *citing*, C. Wright & A. Miller, Federal Practice and Procedure § 2510, at 515 (2d ed. 1971). The jury was properly instructed on the elements of the Estate's claims against defendants and all of their defenses to these claims. There is a strong presumption that the jury properly followed these instructions. *See United States v. Casamento*, 887 F.2d 1141, 1151 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990).

Accordingly, a court must uphold the verdict of a properly-instructed jury if there is any "plausible" explanation for the purported inconsistency in their verdict. *See United States Football v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986) ("the Seventh Amendment imposes upon the courts a constitutional obligation to search for an interpretation of the case which reconciles the verdicts, . . . and which respects the principle that 'juries are not bound by what seems inescapable logic to judges' " *Id.* at 1046 (citations omitted)), *aff'd*, 842 F.2d 1335 (2d Cir. 1988).

In this case, the jury could have easily found that the Estate "justifiably relied" on Mr. Steinberg's and Mr. Zolt's misrepresentations through 1981 and up to December 10, 1982. Mindful of the fact that the jury was properly instructed on the elements of the fraud claim, including its six-year statute of limitations, the Court will accept this highly plausible interpretation of the jury's verdict. Accordingly, we find that the plaintiff's fraud claim is not barred by the six-year statute of limitations.[4]

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[4] Mr. Zolt also argues that the jury's finding of "actual knowledge" on the part of the Estate on December 10, 1993,

B. Waiver and Estoppel

Defendants argue that plaintiff's claims are barred by the doctrines of waiver and estoppel. We disagree. Plaintiff's claims are not barred by waiver or estoppel, because defendants have failed to plead, prove, or submit to the jury the elements of either of these affirmative defenses. *See Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706, 715 (S.D.N.Y. 1987); *Galvez v. Local 804 Welfare Trust Fund*, 543 F. Supp. 316, 317 (E.D.N.Y. 1982). Both waiver and estoppel require a showing not only of knowledge on the part of the plaintiff, but also an intent element which is separate and distinct from a finding of actual knowledge. *See Christian Dior-New York, Inc. v. Koret, Inc.*, 792 F.2d 34, 40 (2d Cir. 1986); *Voest-Alpine International Corp. v. Chase Manhattan Bank, N.A.*, 707 F.2d 680, 685 (2d Cir. 1983); *Rosenthal v. National Life Insurance Co.*, 486 F. Supp. 1018, 1023 (S.D.N.Y. 1980). Thus, the jury's finding that the Estate had actual knowledge as of December 10, 1982, does not establish the intent element of either waiver or estoppel. Since there was no finding by the jury of the requisite intent to satisfy either waiver or estoppel, Mr. Steinberg and Mr. Zolt have failed to carry their burden of establishing the elements of either of these affirmative defenses.

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negates the conversion and breach of fiduciary duty claims. See "Affidavit of Ray Beckerman," filed Nov. 17, 1992, at 3. Mr. Zolt provides no reasoning for this argument, however, and the Court finds that it is without merit. Actual knowledge on the part of plaintiff does not exonerate the defendants on either the conversion or breach of fiduciary claims.

Indeed, as the plaintiff's memorandum makes clear, the main areas addressed in Mr. Bingham's direct testimony were clearly subjects in which he was personally involved (i.e., his personal dealings with Mr. Steinberg and Mr. Zolt, his personal involvement in the tracing of diverted Estate assets and the preparation of the Deloitte & Touche report, and his personal involvement in the sale of recovered Estate assets, the proceeds of which were used to reduce the Estate's damage claim against defendants). *See* Plaintiff's Memorandum, at 30-31.

In addition, defendants argue that Mr. Bingham should have been precluded from testifying based upon purported conflicts of interest. We disagree. The Court believes that any conflict of interest Mr. Bingham may have had would go to his credibility, but would not affect the admissibility of his testimony. Indeed, the nature and extent of Mr. Bingham's alleged conflicts of interest and bias were the subject of extensive and vigorous cross-examination. *See United States v. Hill*, 629 F. Supp. 493, 496 (D.Del. 1986).[5] Accordingly, the Court finds that Mr. Bingham's testimony was admissible.

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[5] The Court notes that Steinberg's citation to the ABA Code of Professional Responsibility, DR 5-102, which precludes an attorney from testifying as a witness in an action he is litigating, is inapposite, because Hughes Hubbard & Reed, and not Mr. Bingham or Kirkpatrick & Lockhart, represents the Estate in this action. *Cf. International Electronics Corp. v. Flanzer*, 527 F.2d 1288 (2d Cir. 1975) (disciplinary rule does not preclude law firm from appearing as trial counsel where former partner may be witness; "[w]e need not be concerned that . . . [the former partner] will unfairly vouch for his own credibility, for he will not be the advocate at trial. He will say no more than the trial judge permits him to say upon his oath." *Id.* at 1294-95).

2. Testimony and Report of Deloitte & Touche:

Defendants claim that the Court improperly admitted the Deloitte & Touche report and improperly allowed Thomas Hafner to testify about the report, because the testimony and the report did not meet the "threshold for relevancy, reliability, or authority." "Reply Memorandum of Law of David J. Steinberg in Support of His Motion for Judgment as a Matter of Law," Feb. 25, 1993, at 17. The Court disagrees. The Deloitte & Touche report was proffered by plaintiff as evidence of the amount of money which was not remitted to the Estate between the years 1981 and 1986. This evidence was directly relevant to the issue of damages, and Mr. Hafner's expert testimony assisted "the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702.[6] Accordingly, we find that the Court did not err in admitting the Deloitte & Touche report and in allowing Mr. Hafner to testify.

3. Testimony Regarding Mr. Steinberg's Retention of Interest in Diverted Funds:

Defendants maintain that the Court erred in admitting plaintiff's and Mr. Hafner's testimony that Mr. Steinberg retained an interest in diverted funds, because such

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[6] In addition, the Court finds no reason to question the reliability of the report or of Mr. Hafner's testimony. We observe that as senior manager at the accounting firm of Deloitte & Touche, Mr. Hafner had the qualifications that make for a reliable and authoritative expert witness.

evidence was irrelevant, or at most, only marginally relevant, and its probative value was substantially outweighed by the risk of prejudice. The Court disagrees. The testimony regarding Mr. Steinberg's retention of interest in diverted funds was relevant on the issue of intent, since it demonstrates that Mr. Steinberg was using, without authorization, funds diverted from the Estate for his personal use. Indeed, this evidence goes to the heart of Mr. Steinberg's defense that he acted at all times in good faith with respect to Estate matters. Under the circumstances, the Court finds that the probative value of the evidence significantly outweighs the danger of unfair prejudice, confusion on the issues, or misleading the jury. Fed. R. Evid. 403.

4. Wayne Coleman's Testimony Regarding Valuation:

Defendants claim that Wayne Coleman should not have been permitted to testify as a rebuttal witness on the subject of valuation because his testimony constituted an unfair surprise to the defendants. The Court disagrees. In the Pretrial Order, the Estate specifically listed Mr. Coleman as a possible expert rebuttal witness, whose testimony would be used to rebut elements of the defendants' case-in-chief relating to the value of the Estate's music assets. *See* Pretrial Order, Exhibit J, at 2 & 7. In addition, the Court is satisfied that the plaintiff produced Mr. Coleman's valuation report to defendants as soon as was practically possible.[7] Accordingly, the Court finds that

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[7] According to the plaintiff, the report was completed only eight hours before copies were given to defendants. *See* Plaintiff's Memorandum, at 37.

Mr. Coleman's testimony regarding valuation was properly admitted by the Court.

F. Erroneous Jury Instructions

1. Instructions Precluding Consideration of Rita Marley's Intestate Share:

Defendants maintain that the Court erred in instructing the jury that they could not consider Rita Marley's intestate share of Bob Marley's Estate in determining whether the Estate suffered any actual loss. The Court disagrees. The jury should not be permitted to consider Rita Marley's entitlement in assessing damages since defendants have failed to proffer sufficient evidence to "provide the jury with a sound basis for approximating with reasonable certainty" the amount of Rita Marley's entitlement. *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 852 (2nd Cir. 1987). Thus, any determination by the jury as to such amount would be speculative and, as such, cannot constitute a proper basis for an offset. *See Wolff & Munier, Inc. v. Whiting-Turner Contracting Co.*, 946 F.2d 1003, 1012 (2nd Cir. 1991). Accordingly, we find that the Court did not err in precluding consideration of Rita Marley's intestate share. *See* Trial Tr. 8561-65.

2. Instruction Precluding Consideration of Beneficiaries' Positions:

Defendants claim that the Court erred in instructing the jury that only actual loss to the Estate was at issue, and that the individual beneficiaries' positions were irrelevant. We disagree. An estate is an entity apart and

distinct from its beneficiaries. The respective positions of the estate's beneficiaries does not affect the measurement of damages incurred by the Estate. Accordingly, we affirm our trial ruling that the proper measure of plaintiff's damages was the loss to the Estate and not the loss to the individual beneficiaries. *See* Trial Tr. 8561.

3. Instruction Precluding Consideration of Rise in Value of "Diverted Corporations":

Defendants claim that the Court erred in instructing the jury not to consider the increase in value of the "diverted corporations" unless defendants were only found liable for negligence. We disagree. First of all, defendants are not entitled to an offset for enhancement because defendants were found liable as intentional tort feasors and faithless fiduciaries. Defendants should not be able to reap the benefit of any enhancement in the value of the assets during the period of wrongdoing. *See Randall v. Loftsgaarden*, 478 U.S. 647, 662-63 (1986); *Estate of Rothko*, 379 N.Y.S.2d 923, 965 (1975), *aff'd*, 401 N.Y.S.2d 449 (1977). *See also Janigan v. Taylor*, 344 F.2d 781 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965) ("It is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them." *Id.* at 786).

Secondly, defendants are entitled to a "credit" for any enhancement of the value of the recovered music assets *only* if the jury determines that the enhancement was a result of defendant's [sic] efforts and expenditures. *See American East India Corp. v. Ideal Shoe Co.*, 400 F. Supp. 141, 168 (E.D. Pa. 1975), *aff'd*, 568 F.2d 768 (3d Cir. 1978); *Segar v. State*, 445 N.Y.S.2d 894, 897 (1981). Because defendants

have failed to proffer sufficient evidence on what portion of the increase in the value of the music assets was attributable to the efforts and expenditures of the defendants, we believe the jury was correctly instructed not to consider the increase in value of the diverted corporations.

4. Instruction Allowing Estate to Claim Royalties Owing to "Diverted Corporations" as Damages:

Defendants maintain that the Court erred in permitting the Estate to claim as damages royalties that were owed to the diverted corporations. We disagree. In this argument, defendants urge a formalistic distinction between the Estate, as the owner of the corporations, and the corporations themselves, arguing that only the latter may sue for the diversion of royalty income. In cases where an estate owns the corporation, however, courts, including the Second Circuit Court of Appeals, have disregarded the separate status of the corporation from its owner for the benefit of the estate. *See Musico v. Champion Credit Corp.*, 764 F.2d 102, 108-110 (2d Cir. 1985). We believe that in this case disregarding the distinction between the corporations and their owner, the Estate, is necessary to prevent fraud and achieve equity. *Id.* at 108. Accordingly, we find that the Court did not err in permitting the Estate to claim as damages royalties that were owed to the diverted corporations.

G. No Evidence of Actual Loss

Defendants claim that they are entitled to judgment as a matter of law because damages are an essential

aspect of all plaintiff's purported causes of action and because plaintiff failed to present any evidence that the Estate suffered an actual loss in the case. We disagree. The Court believes that the plaintiff presented substantial evidence of actual loss, in particular with respect to the assets that were diverted from the Estate by the defendants.

H. The Award of Punitive Damages to Plaintiff Is Erroneous

Defendant Mr. Steinberg argues that the award of $1,000,000 in punitive damages is erroneous to the extent it is based on RICO claims since RICO's treble damages provision is itself punitive in nature. Although it appears to be an open question in the Second Circuit as to whether RICO's treble damages provision is in fact punitive in nature, this Court has held that RICO's treble damages provision precludes recovery of punitive damages. *See Galerie Furstenberg v. Coffaro*, 697 F. Supp. 1282 (S.D.N.Y. 1988) ("Since . . . [plaintiff] sues here under the federal RICO laws, whose plain language do not allow for punitive damages, and has not shown that Congress intended such damages to be available under RICO, [the claim for punitive damages is dismissed]" *Id.* at 1289).

In this case, plaintiff received $800,000 on its RICO claims, which was trebled by the Court to $2,400,000. Given this substantial increase, we do not believe that a punitive damage award would be appropriate if it is based on the RICO violations. It is generally sound practice not to ask a jury to consider awarding separate punitive damage awards in cases involving multiple

claims, since such a practice can artificially inflate the aggregate amount awarded. *See King v. Macri*, 1993 WL 141716, at 4 (2d Cir. 1993). Accordingly, it is impossible to discern on which claims the jury based its award of punitive damages. *See* Special Verdict Sheet, questions 61-62. Under the circumstances, the Court believes that a reduction in the punitive damages award is in the interests of reasonableness and fairness to the litigants. Specifically, we find that an award of $250,000 is sufficient to deter similar conduct by the defendant in the future and to serve as a warning to others not to engage in such wrongful non-RICO acts. In addition, we find that such a figure bears a reasonable relationship to the harm done and the flagrancy of the conduct causing it. Accordingly, we order that the judgment be revised to reflect a punitive damage award of $250,000 against defendant Mr. Steinberg, as opposed to the previous figure of $1,000,000. *See Aldrich v. Thomson McKinnon Securities, Inc.*, 756 F.2d 243 (2d Cir. 1985) ("It is the duty of a court . . . 'to keep a verdict for punitive damages within reasonable bounds' . . . " *Id.* at 248-49 (citations omitted)).[8]

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[8] Defendant Steinberg argues that the award of punitive damages violates the Eighth and Fourteenth Amendments to the United States Constitution. The defendant fails to cite any cases for this novel proposition, and the Court finds that it is without merit.

The defendant also argues that punitive damages are not available in this case because "the only alleged 'damages' plaintiff sustained occurred after plaintiff had actual knowledge of the allegedly wrongful acts, and plaintiff failed to conduct a reasonably diligent inquiry." "Motion of Defendant David J. Steinberg for Judgment as a Matter of Law," Jan. 19, 1993, at 15.

I. The Jury's Verdict Was Tainted by Unfair Prejudice

Defendant Mr. Steinberg maintains that he was unfairly prejudiced by the Court's requiring him to invoke the Fifth Amendment in the jury's presence. We disagree. The Supreme Court has stated that the Fifth Amendment does protect a witness against the "imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' " *Spevack v. Klein*, 385 U.S. 511, 515 (1967) (citations omitted). However, we do not believe that Mr. Steinberg's invocation of the Fifth Amendment was "costly" in a constitutional sense. We have reached this conclusion in light of the facts that the jury was properly instructed on the issue of Mr. Steinberg's invocation of the Fifth Amendment (*See* Jury Charge, Instruction No. 25, at 17), and that the plaintiff presented substantial evidence against Mr. Steinberg apart from any proper adverse inferences consequent to his invocation of the Fifth Amendment. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

In addition, the Court finds that Mr. Steinberg's testimony was admissible under Rule 403 of the Federal Rules of Evidence in that its probative value substantially outweighed the risk of unfair prejudice. The Court believes that Mr. Steinberg's invocation of the Fifth Amendment was highly probative on the issue of liability (*See Brink's*,

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Again, the defendant fails to provide a case for his proposition, and the Court finds that the fact that the Estate had actual knowledge and did not conduct a reasonably diligent inquiry does not prevent the imposition of a punitive damages award, which, in this case, was imposed by a jury properly instructed as to the standard for awarding punitive damages.

Inc. v. City of New York, 539 F. Supp. 1139 (S.D.N.Y. 1982) (invocation of Fifth Amendment has "significant probative value" on issue of liability), *aff'd*, 717 F.2d 700 (2d Cir. 1983)), and that any prejudice Mr. Steinberg suffered as a result of the invocation was not "unfair" (*See Id.* at 710).

J. Motion for an Order Staying the Proceedings

As the Court has hereby disposed of all the issues raised in the defendants' motions, defendants' motion to stay proceedings pending the disposition of the motion for judgment as a matter of law is moot.

K. Plaintiff's Motion to Register Judgment Outside of New York

Plaintiff has requested that this Court order that the Judgment in this case be registered in the district of Pennsylvania, on the ground that "[since] Steinberg is a Pennsylvania resident, presumably most if not all of his assets lie outside of this district." Plaintiff's Memorandum, at 54. Plaintiff correctly observes that registration of a judgment in another district may be allowed for "good cause" (28 U.S.C. § 1963 (West Supp. 1992)), and that good cause may be shown where the defendant has substantial property in another district and insufficient property in the rendering district to satisfy the judgment. However, the plaintiff has not provided a case, nor have we found one, that stands for the proposition that an automatic presumption of "good cause" is established by the fact that a defendant has a different residence than that of the rendering district. Accordingly, at this time,

we deny plaintiff's request for an order to register this Judgment in Pennsylvania, but will allow plaintiff to refile this motion upon a more convincing showing of good cause.

L. Plaintiff's Application for Attorney's Fees and Disbursements

In the Judgment entered by this Court on January 4, 1993, the Estate was awarded reasonable attorneys' fees against defendants Mr. Zolt and Mr. Steinberg pursuant to 18 U.S.C. § 1964(c). In accordance with the Judgment, the plaintiff has submitted an accounting with respect to attorneys' fees and disbursements, requesting $3,300,000 in legal fees and $264,033.48 in disbursements, for a total of $3,564,033.48. *See* "Plaintiff's Revised Accounting with Respect to Attorneys' Fees and Expenses, Submitted Pursuant to the Judgment Entered Herein, and Revised Affidavit in Support Thereof" ("Plaintiff's Accounting"), Feb. 5, 1993.

The Court has carefully reviewed the Plaintiff's Accounting and the defendants' opposition affidavits. *See* Jeremy Mishkin's "Affidavit in Opposition to Plaintiff's Revised Accounting with Respect to Attorneys' Fees and Expenses" ("Affidavit in Opposition"), Feb. 18, 1993; Ray Beckerman's "Affidavit Concerning Plaintiff's 'Accounting' of Attorneys' Fees," Feb. 3, 1993. We are somewhat troubled by the high level of expenses incurred by the plaintiff, in particular with respect to certain aspects of the Plaintiff's Accounting. The Court does not challenge the veracity of the figures, but does question the reasonableness of certain expenses (e.g., billing $24,108.75 in legal fees in a single day (*See* Plaintiff's Accounting, at

491, entries for October 29, 1992); 23 hours charged by a single attorney on a single day (*See* Plaintiff's Accounting, at 463, entry for S.D. Rothman on September 24, 1992)).

Under the circumstances, the Court will reduce the plaintiff's requested total by fifteen percent. Accordingly, the Court awards the plaintiff attorneys' fees and disbursements in the sum of $3,029,428.46.[9]

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[9] In Mr. Mishkin's Affidavit in Opposition, he argues that the fees which were incurred subsequent to the commencement of the contingent fee arrangement between the Estate and its attorneys are not actual expenses of the Estate for purposes of computing the award of attorneys' fees against Mr. Steinberg and Mr. Zolt. We disagree. The establishment of a contingent fee does not alter the computation of attorneys' fees in a manner that would eliminate the expenses for hourly billing. *See City of Burlington v. Dague*, 112 S.Ct. 2638, 2639-41 (1992); *Williamsburg Fair Housing Committee v. Ross-Rodney Housing Corp.*, 599 F. Supp. 509, 519 (S.D.N.Y. 1984).

In addition, the Court declines to reduce the award of attorneys' fees to reflect the fact that $250,000 of the damages was for non-RICO claims. While the non-RICO claims by themselves do not merit an award of attorneys' fees, the Court believes that all of the plaintiff's claims involved a common nucleus of facts and were based on related legal theories. Under the circumstances, we believe that any reduction in the award of attorneys' fees due to the non-RICO claims would be inappropriate. *See Hensley v. Eckerhart*, 103 S.Ct. 1933, 1940 (1983).

The Court rejects defendants' request for a jury trial, discovery, and an evidentiary hearing on the issue of attorneys' fees. Courts have the responsibility of calculating an award of attorneys' fees which is made pursuant to a statute. *See Gagne v. Town of Enfield*, 734 F.2d 902, 904 (2d Cir. 1984); *United States Football League v. National Football League*, 704 F. Supp. 474, 476 (S.D.N.Y.), *aff'd*, 887 F.2d 408 (2d Cir. 1989), *cert. denied*, 493 U.S.

fails to plead fraud with particularity, and the complaint fails to state claims for which relief may be granted.

The First Amended Complaint asserts the existence of a conspiracy among the defendants, accountants and attorneys in Philadelphia and New York, and alleges conversion, fraud, breach of fiduciary duty, negligence, gross negligence, and violations of the Racketeer Influenced and Corrupt Organization Act (RICO).

J. Reid Bingham is a citizen and resident of Florida. This action is brought by Bingham as Ancillary Administrator in New York of the Estate of Bob Marley.[1] Defendant Zolt & Loomis is a professional corporation of accountants organized and existing under the laws of the State of New York, with its principal place of business in New York City. Defendant Zolt is a citizen and resident of New York and an officer and principal of Zolt & Loomis. Defendant Bluestein, Rutstein & Mirarchi ("BR&M") is a professional corporation organized and existing under the laws of Pennsylvania, with its principal place of business in Philadelphia, Pennsylvania. Defendant Greenstein, Gorlick, Price, Silverman & Laveson ("GGPS&L") is a law partnership with its principal place of business in

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[1] On December 17, 1981, Letters of Administration of the Estate were issued out of the Supreme Court of Judicature of Jamaica to Mutual Security Merchant Bank ("the Bank"), to George Desnoes, and to Rita Marley, the widow of Bob Marley. The Bank is duly organized and existing under the laws of Jamaica with its principal place of business in Kingston, Jamaica. George Desnoes and Rita Marley are both citizens and residents of Jamaica. On February 27, 1987, Ancillary Letters of Administration were issued out of the Surrogate's Court, New York County, to Bingham.

Philadelphia. Defendant Steinberg was a partner and counsel of GGPS&L from at least 1981 to about June, 1983. Since then, he has been an employee, principal, and counsel of BR&M. Coudert Brothers ("Coudert") is a law partnership with its principal place of business in New York City. Defendant Oliner is a citizen and resident of New York State. Until October, 1981, Oliner was a partner of Coudert. Since then, he has been the sole principal of Martin Oliner, P.C.

Bob Marley, a citizen and resident of Jamaica, died intestate on May 11, 1981. At the time of his death, Zolt and Zolt & Loomis had been acting as consultants and accountants for Bob Marley and his various music and publishing companies, and Steinberg and GGPS&L had been acting as consultants and attorneys for Marley and his companies. Shortly before Marley's death, Zolt and Steinberg retained Coudert Brothers, through Oliner, to act on behalf of Marley as attorneys and international tax consultants. After Marley's death, the Co-Administrators of the Estate appointed Zolt, Zolt & Loomis, Steinberg and GGPS&L to represent them as agents and representatives with respect to all Estate matters outside of Jamaica.

The plaintiff alleges at the time of or shortly after Marley's death, Zolt, Steinberg, and Oliner developed and engaged in a conspiracy and scheme to defraud the Estate and convert its assets. In response to inquiries from the Bank regarding the ownership and assets of the British Virgin Island Companies, it is asserted that Steinberg and Zolt repeatedly responded that those companies were not assets of the estate because Marley had transferred his stock interest in the companies to Rita Marley

before he died. Despite these representations, Mutual Security Bank continually requested written evidence of the stock transfers. The plaintiff claims that on or about June 26, 1981, Zolt, Steinberg, Oliner, and Rita Marley met at the offices of Coudert Brothers and, at the direction of Zolt, Steinberg and Oliner, Rita Marley forged Bob Marley's signature on three share transfers and pre-dated them to June 6, 1978. In or about June 1982, it is claimed, Steinberg and Rita Marley delivered the bogus share transfers to the Bank.

According to the complaint, after Marley's death, Zolt, Steinberg and Oliner, in concert with others, (i) caused the British Virgin Island Companies to be dissolved and/or discontinued, (ii) caused the assets of those companies to be transferred to a newly formed Netherland Antilles company named Music Publishing Companies of Bob Marley, N.V., and (iii) caused the assets of the Netherland Antilles company to be transferred to a newly formed Dutch subsidiary company named Bob Marley Music Ltd. B.V. Thereafter, it is asserted, Steinberg, Zolt, and Oliner ran and operated the Netherland Antilles company and the Dutch company. All income previously paid to the British Virgin Island Companies was paid to the Dutch company, and Steinberg or Zolt received all such income directly. Allegedly, Steinberg and Zolt would deduct a percentage of the income and place the percentage in a "fee fund" account primarily for their own benefit and use. They would deposit the balance into a bank account set up and maintained by Zolt in the name of the Dutch company. The plaintiff further claims that funds in that account would, in turn, be transferred by Zolt into a bank account in the name of the

Netherland Antilles company. Finally, Zolt would transfer the funds into bank accounts set up by Zolt in the names of both Rita Marley and Zolt, and the funds would be distributed from that account, according to the complaint.

Steinberg and Zolt, in conjunction with Oliner, allegedly continued to operate the Dutch company and the Netherland Antilles company until the plaintiff discovered the conspiracy and scheme in or about September, 1986. Through the conspiracy and scheme, Steinberg, Zolt, and Oliner are said to have diverted more than $8,000,000 from the Estate, of which over $1,000,000 was paid to the defendants. Based on the foregoing allegations, Bingham asserts claims under the Racketeer Influenced and Corrupt Organization Act ("RICO") and state common law.

The RICO Claims

RICO authorizes a private cause of action for "[a]ny person injured in his business or property by reason of a violation of Section 1962." 18 U.S.C. § 1964(c). To state a claim for damages based on a violation of § 1962, a plaintiff must allege the following elements: "(1) that the defendant [or defendants] (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

Defendants attack the sufficiency of almost every element of plaintiff's RICO claims. The Court will first address plaintiff's failure to plead the existence of an enterprise.[2]

In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), the Supreme Court indicated that two predicate acts may not be sufficient to establish a pattern of racketeering activity within the meaning of § 1962. The Court relied on the Senate Report accompanying the statute which explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern."

Following *Sedima*, courts within this circuit struggled to impose the "continuity plus relationship" requirement on RICO pleadings. Initially, the majority of courts declined to find a pattern of racketeering activity where the alleged predicate acts supported only one discreet scheme or fraudulent transaction. *See, e.g., Frankart Distrib., Inc. v. RMR Advertising, Inc.*, 632 F. Supp. 1198 (S.D.N.Y. 1986). In *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987), the Court of Appeals appeared to reject the "single scheme" approach, at least in the criminal context, ruling that the pattern requirement is established by the commission of two or more of the predicate acts listed in the statute.

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[2] The complaint names four enterprises: Zolt and Loomis, P.C., BR&M, GGPS&L, and Martin Oliner, P.C., and Coudert.

Despite *Ianniello*, courts continued to apply the "single scheme" approach distinguishing *Ianniello* as "a criminal case which did not raise the serious problems presented by civil RICO." *Shopping Mall Investors N.V. Frances*, No. 84 Civ. 1469 (S.D.N.Y. 1987). The Court of Appeals soon rejected that distinction in *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988), ruling that two related predicate acts established a pattern of racketeering activity in civil as well as criminal cases. *Id.* at 51.

The Court, however, effectively achieved the same result reached under the "single scheme" approach by reading the requirement of "continuity plus relationship" into the enterprise element of the alleged violation.[3] According to *Beck*, a plaintiff must establish the existence of a *continuing* enterprise to succeed on a civil RICO claim. Because the alleged enterprise in that case "had but one straightforward, short-lived goal," it was not sufficiently continuous to constitute an "enterprise" within the meaning of 18 U.S.C. §§ 1961-62.

The Court of Appeals clarified the continuing enterprise requirement in *Albany Insurance Co. v. Esses*, 831 F.2d 41 (2d Cir. 1987). There, an insurance company brought a RICO action against the insured, a corporation that imported women's shoes, and its president, Esses, alleging that the insured submitted false valuation statements and a false insurance claim via the mails. In 1982, Esses leased warehouse space in Brooklyn, New York, and

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[3] "[W]hether one looks for the requisite continuity and relatedness by examining the pattern or the enterprise is really a matter of form, not substance." *Beck, supra*, at 51.

thereafter prepared bills of lading that falsely reported the transfer of shoes from another warehouse to the Brooklyn warehouse. Esses also mailed monthly statements of value to the insurer that materially overstated the value of the stored merchandise. Following a fire in the Brooklyn warehouse in July, 1983, Esses filed a fraudulent insurance claim which included a sworn proof of loss statement.

The Court of Appeals rejected the plaintiff's contention that Esses and the Shoe Store constituted a continuing enterprise within the meaning of § 1962 and affirmed the district court's dismissal of the complaint. The Court reasoned that there was "nothing in Albany's . . . complaint that indicates a *threat of continuing criminal activity beyond*" the finite, completed goal of defrauding the insurance company. *Id.* at 44 (emphasis added). Absent the threat of continuing criminal activity, the relationship between the defendant corporation and its owner did not constitute a continuing criminal enterprise. *See also Creative Bath Products v. Connecticut Gen. Life Ins. Co.*, 837 F.2d 561 (2d Cir. 1988) (plaintiff must establish existence of enterprise whose illicit activities or unlawful goals are continuing ones).

For purposes of the enterprise analysis, the Court sees no significant difference between the fraud scheme in *Albany* and the scheme alleged in this case. As in *Albany*, the alleged enterprise had only one target – the Estate of Bob Marley – and one finite goal – the transfer of Marley's shares in the British Virgin Island Companies to Rita Marley.

That the defendants continued to control and receive income from the companies formed from Estate assets does not compel a different conclusion. To say that their continuing control of the music companies constituted ongoing criminal activity would allow plaintiffs to turn every finite scheme – or at least those involving economic crimes – into an enterprise simply by characterizing the defendant's subsequent enjoyment of the proceeds of the scheme as continuous criminal activity.

For example, if the defendants in *Albany* had placed the insurance payment in a bank account, any interest earned would certainly be unjust enrichment yet it would not have converted the straightforward short-lived goal into ongoing criminal activity. In *Creative Bath, supra,* the RICO claims arose out of allegedly fraudulent representations made by defendants in connection with the sale of certain insurance policies. The insurance policies undoubtedly required periodic premium payments but such payments did not convert an otherwise finite scheme into ongoing criminal activity. The Court is not persuaded that the fraudulent diversion of specific – albeit income-producing – assets without the threat of continuing criminal activity supports the existence of a RICO enterprise as defined by *Beck, Albany,* and *Creative Bath, supra.*

The defendants attack the complaint for naming each of the partnerships and P.C.s as both an enterprise through which the individual defendants acted and as a person liable for the alleged RICO violations. Under §§ 1962(a) and 1962(c), a corporation, lawfirm or other "association in fact" cannot be both the "enterprise" and the "person" for purposes of RICO liability. *Bennett v.*

United States Trust Co. of New York, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Rush v. Oppenheimer*, 628 F. Supp. 1188 (S.D.N.Y. 1985). Although each firm may be an enterprise through which individual members act, the firms must have been acting through an enterprise or enterprises other than themselves in order to be liable as "persons" under RICO. *Park South Associates v. Fischbein*, 626 F. Supp. 1108 (S.D.N.Y.), *aff'd*, 800 F.2d 1128 (2d Cir. 1986). Thus, plaintiff fails to state a RICO claim against Zolt & Loomis, BR&M, GGPS&L, and Coudert.

The complaint also fails to allege violations of §§ 1962(a) and (b) by any of the defendants. Plaintiff apparently believes he can state a claim under either of these subsections merely by invoking them. Such is not the case. The complaint is devoid of any allegation that the individual defendants invested, acquired, or maintained interests in the named enterprises through the pattern of racketeering described. Paragraph 55, which purports to state violations of §§ (b) and (c), does not even track the language of §§ (b) and (c). As drafted, the complaint suggests, incorrectly, that violations of §§ (b) and (c) arise automatically from the allegations of predicate acts in paragraph 54.

Even if the complaint properly alleged violations of subsections (a) and (b), it would fail to state a claim under these provisions because it does not allege that plaintiff was "injured in his business or property by reason of" the violations. *Kaufman v. Chase Manhattan Bank, N.A.*, 581 F. Supp. 350 (S.D.N.Y. 1984). The Court declines to interpret that omission as an oversight on plaintiff's part since the complaint expressly alleges that

the Estate was injured by the violations of subsections (c) and (d).

Although some of the complaint's deficiencies might be cured by amendment, granting leave to replead in this case "would serve no useful purpose." *Albany, supra,* at 45. There is no indication from either the complaint or plaintiff's memorandum of law that plaintiff could establish the "continuity plus" required by *Beck, Albany,* and *Creative Bath, supra.* Accordingly, plaintiff's RICO claims are dismissed without leave to replead.

Diversity Jurisdiction

The remaining common law claims are viable, of course, only if the Court has jurisdiction based upon diversity of citizenship of the parties. Defendants contend that diversity jurisdiction has been improperly manufactured in this case and, therefore, the remaining claims must be dismissed along with the RICO claims. Their argument, simply stated, is that the Estate should have chosen a New York ancillary administrator because the Estate chose a New York lawfirm to prosecute this action. They insist that Bingham was appointed to insure complete diversity between the plaintiff and defendants, several of whom are citizens of New York.

Ordinarily, when a suit is brought by an administrator, the citizenship of the administrator and not that of the decedent controls for jurisdictional purposes. *O'Brien v. Avco Corp.*, 425 F.2d 1030 (2d Cir. 1969). An exception exists when the administrator or other representative

party is appointed solely to create diversity of citizenship. *Id.* Such an appointment runs afoul of 28 U.S.C. § 1359 which provides:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

See O'Brien, supra; Trager v. New Rochelle Hospital Medical Center, 453 F. Supp. 516, 519 (S.D.N.Y. 1978). Defendants argue that plaintiff's citizenship should not be considered in determining whether jurisdiction exists because he was chosen as ancillary administrator solely to create diversity jurisdiction. Plaintiff contends that § 1359 is inapplicable to this case because there were substantial legitimate motives for appointing plaintiff as ancillary administrator apart from the creation of diversity jurisdiction. After careful consideration of the authorities cited by the parties, the Court concludes that 28 U.S.C. § 1359 is not implicated by the facts of this case.

In *O'Brien, supra*, at 1033, the Court of Appeals found "no excuse for engulfing the already overburdened federal courts with cases involving controversies between *citizens of the same state* who seek to invoke federal jurisdiction through sham transactions (emphasis added)." There, the decedent's wife, a citizen of New York and administratrix of decedent's estate, brought suit against a New York defendant in state court. Fearing that the case would be transferred to another county, she resigned as administratrix and appointed a New Jersey administrator for the admittedly limited purpose of prosecuting the

action in a federal court. The Court found that the administrator had been improperly joined within the meaning of § 1359. Like *O'Brien*, the majority of cases applying § 1359 involve the appointment of a nonresident representative to initiate an otherwise local controversy in federal court. These cases reflect the view "that a *primarily local controversy* should be tried in the appropriate state forum and that nominal or formal parties, who do not have a significant interest in the outcome of the litigation, should not be able to use the federal courts." C. Wright & A. Miller Federal Practice & Procedure § 1556 at 711 (emphasis added). Courts have also ignored the citizenship of formal parties where the underlying suit was between aliens and thus not within the court's diversity jurisdiction. *See, e.g., Betar v. De Havilland Aircraft*, 603 F.2d 30 (7th Cir. 1979), *cert. denied*, 444 U.S. 1098 (1980). The common thread running through all of these cases is that the appointment of a representative should not be allowed to create jurisdiction when the citizenship of the party who has the actual stake in the litigation would defeat jurisdiction.

In the present case, the party with the actual stake in the litigation is the estate of Robert Marley, a *Jamaican* entity. This action was commenced by Mutual Security Bank, the *Jamaican* Co-Administrator of the Marley estate. Bingham petitioned the New York Surrogate's Court to become ancillary administrator only after a question was raised as to whether a foreign administrator could maintain an action in New York on behalf of a foreign estate. Had the bank remained as plaintiff, jurisdiction would have existed under 28 U.S.C. § 1332(a)(2), which grants

the direction of Zolt and Steinberg. The allegations based upon information and belief are supported by the affidavit of G. Louis Byles, Managing Director of the Bank, and by Rita Marley's letter of resignation as co-administratrix of Marley's estate.[4] Finally, the complaint alleges that Zolt, Steinberg and Rita Marley delivered the share transfers, "falsely represented by them to be the transfers by Bob Marley of his shares in the . . . British Virgin Island Companies," to the Bank. These allegation are more than sufficient under Rule 9(b).

b. Oliner

Although the complaint alleges that Oliner participated in certain aspects of the scheme with Zolt and Steinberg, the only allegation that raises an inference of scienter on Oliner's part is paragraph 26. Paragraph 26, based upon information and belief, alleges that Oliner, along with Zolt and Steinberg, directed Rita Marley to forge and backdate the stock transfers. As already noted, G. Louis Byles' affidavit and Rita Marley's letter of resignation support the allegations in paragraph 26 as against Zolt and Steinberg. They do not, however, support the allegations against Oliner. According to Rita Marley's letter, she was instructed to sign the share transfers based upon the assurance that it "was necessary . . . to effectuate a tax structure which had been approved by Bob with the advice of leading tax counsel in New York." Even

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[4] The Rita Marley letter and the Byles affidavit are part of the record for purposes of the Rule 9(b) analysis. *Cf. Clairdale Enterprises v. C.I. Realty Investors*, 423 F. Supp. 257, 259 (S.D.N.Y. 1976).

assuming that "leading tax counsel in New York" is Oliner, the letter suggests, at best, that Bob Marley received unspecified tax advice from Oliner and that Rita Marley was convinced by Steinberg and/or Zolt that the forgeries would effectuate that advice. According to Byles, Rita Marley told him that she was directed by Zolt and Steinberg to forge the share transfers. His affidavit makes no mention of Oliner. The connection between the fraud and unidentified tax advice which may or may not have been given by Oliner to Bob Marley in his lifetime is insufficient to support plaintiff's belief that Oliner was actually present at and encouraged Rita Marley's forgery of the share transfers. The complaint contains other allegations about Oliner but, absent the allegations in paragraph 26, they do not raise an inference of fraud. Paragraphs 27-29 detail Zolt's, Steinberg's, and Oliner's handling of the British Virgin Island Companies. That conduct was entirely consistent with a good faith belief in Rita Marley's ownership of those companies. Except for paragraph 26, nothing in the complaint suggests that Oliner should have known that the companies were, in fact, wrongfully transferred to Rita Marley.

c. The racketeering acts

Allegations of mail and wire fraud which underlie a RICO claim must also be pled with particularity, and plaintiff's failure to do so provides a separate basis for dismissal of his RICO claim. *Frota v. Prudential-Bache Securities, Inc.*, 639 F. Supp. 1186, 1192 (S.D.N.Y. 1986). Nowhere in the complaint does plaintiff allege the time, place, or content of any act of mail or wire fraud. Conclusory allegations of mail or wire fraud in connection

with the scheme do not substitute for the degree of specificity required under Rule 9(b). *Id.*

Plaintiff's reliance on *Beth Israel Medical Center v. Smith*, 576 F. Supp. 1061, 1071 (S.D.N.Y. 1983), and *Rich-Taubman Associates v. Stamford Restaurant Operating Company, Inc.*, 587 F. Supp. 875 (S.D.N.Y. 1984), is unavailing. In *Taubman*, one of several defendants contended that the complaint failed to particularize the acts of racketeering activity necessary to support a RICO claim. The court rejected that argument because the complaint adequately specified the acts of racketeering activity against the other defendants, and those acts were attributable to the movant because the complaint alleged that the movant was part of a conspiracy. The complaint also pled facts sufficient to support the conspiracy allegation. In the case at bar, plaintiff has not sufficiently particularized his allegations of mail and wire fraud against any of the defendants, and none of the enterprise defendants is charged with conspiracy. As to the conspiracy allegations against Oliner, "a conspiracy requires factual allegations showing a meeting of minds. . . . conclusory allegations are insufficient." *Goldschmidt v. Patchett*, 686 F.2d 582, 585 (7th Cir. 1982); *Taubman, supra*, at 879 n.5 (fact allegations adequately supported conspiracy charge). Except for paragraph 26, the complaint does not raise an inference that Oliner was part of the conspiracy.

In *Beth Israel*, plaintiff's failure to specify particular acts of mail or wire fraud was not fatal to the complaint because the complaint otherwise described the defendants' scheme in great detail and, therefore, it was "certainly reasonable to infer that mail and/or telephone

communications were used in furtherance of the defendants' scheme." *Id.* at 1071. Judge Lasker's reasoning in *Beth Israel* applies, at best, only to Zolt and Steinberg. Moreover, the complaint's failure to adequately particularize the predicate acts alleged against the enterprise defendants is not cured by the sufficiency of the pleadings as against Zolt and Steinberg because vicarious liability is not a proper basis for a finding of liability under RICO. *Frota, supra,* at 1192.

Time Bar Defenses

Defendants contend that the statutes of limitations governing Bingham's state law claims have expired. Bingham responds that under the doctrine of equitable tolling the applicable limitations periods were tolled until 1986 when the Estate discovered the scheme. Under New York law, "a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentation, or deception to refrain from filing a timely action." *Simcuski v. Saeli,* 406 N.Y.S.2d 259, 262 (1978). Where fraudulent concealment is alleged, the limitations period does not begin to run until plaintiff discovers, or by reasonable diligence should have discovered, the facts giving rise to his claim. *Donahue v. Pendleton Woolen Mills, Inc.,* 633 F. Supp. 1423 (S.D.N.Y. 1986). In the present case, it appears, for purposes of this analysis, that facts necessary for the Estate to discover that it had a claim were fraudulently concealed and misrepresented.

Shortly after Marley's death, the bank attempted to ascertain the ownership of the British Virgin Island Companies. Despite assurances from Marley's legal and financial advisors that the companies were not assets of the Estate, the bank demanded written evidence of the stock transfers. In June, 1982, Zolt, Steinberg and Rita Marley gave the bank the forged share transfers, according to the complaint. Accepting the allegations in the complaint as true, as must be done at this stage, plaintiff could not, with reasonable diligence, have discovered the fraud until June, 1986, when Marley's former manager told the bank that the share transfers were forged.

Inexplicably relying on *Hurley v. Hurley*, 110 N.Y.S.2d 299 (1st Dep't 1952), *aff'd*, 306 N.Y. 647 (1953), several defendants argue that Rita Marley's participation in the fraud gave the Estate constructive knowledge of the fraud and, therefore, the Estate is not entitled to the benefit of equitable tolling. *Hurley*, however, had nothing to do with constructive notice let alone constructive notice in these circumstances. Here, the controlling and eminently sensible rule is that knowledge of actions taken by an agent adverse to the principal's interests will not be imputed to the principal. 42 N.Y.Jur., Notice and Notices § 4 at 384-85. Rita Marley's asserted participation in a scheme to divert assets of the Estate was certainly adverse to the Estate and her knowledge of the scheme will not be imputed to it.

The doctrine of fraudulent concealment tolls the running of the statute of limitations only as to the defendants who committed the concealment. *Greenfield v. Kanwit*, 87 F.R.D. 129, 132 (S.D.N.Y. 1980). Coudert contends that plaintiff does not allege any acts of concealment on the

part of Coudert. Since Bingham seeks to hold Coudert vicariously liable for the actions of Oliner, Coudert's argument stands or falls on whether Bingham alleges that Oliner engaged in any acts of fraudulent concealment. The only fraudulent act attributed to Oliner in the complaint is his presence at and encouragement of Rita Marley's forgery of the stock transfers. As already noted, that allegation is pled on information and belief and the materials submitted in support of that allegation are insufficient to raise an inference that Oliner participated in the fraud. If plaintiff's anticipated second amended complaint does not sufficiently allege acts of fraudulent concealment on the part of Oliner, than [sic] Bingham's state law claims against Coudert will be time-barred and the complaint will be dismissed as against it.

In addition to fraudulent concealment, continuous representation by an attorney or accountant with respect to the matter giving rise to the complaint will toll the running of the limitations period until the representation ceases. *Siegel v. Kranis*, 288 N.Y.S.2d 831 (2d Dept. 1968); *Wilkin v. Dana R. Pickup & Co.*, 347 N.Y.S.2d 122 (Sup. Ct. Allegany Cty. 1973). With respect to Zolt and Steinberg, the statutes were tolled until they each ceased to represent the Estate. Exactly when they ceased to represent the Estate, however, is not clear from the complaint. The second amended complaint must specify when Steinberg and Zolt ceased to represent the Estate.

Vicarious Liability as to the Defendant Law Firms

As already noted, Bingham seeks to hold Coudert vicariously liable for the actions of Oliner. Under New

York Partnership Law, a partnership is liable for the wrongful acts of one of its partners if either (1) the partnership authorized the acts or (2) the acts were committed within the ordinary course of the partnership's business. New York Partnership Law § 24 (McKinney's 1977). Since the complaint does not allege that Coudert authorized the acts in question, the Court must determine whether, drawing all reasonable inferences in favor of plaintiff and presuming all factual allegations to be true, Oliner's acts could be deemed to have been committed in the ordinary course of Coudert's business.

Coudert cites *McDonnell v. American LeDuc Petroleums, Ltd.*, 456 F.2d 1170, 1187 (2d Cir. 1972), and *Gerdes v. Reynolds*, 28 N.Y.S.2d 622, 646 (Sup. Ct. Nassau Cty. 1941), in support of its argument that the Court should determine from the face of the pleadings whether Oliner's acts were committed in the ordinary course of partnership business. Contrary to Coudert's assertion, however, neither case involved a dismissal for failure to state a claim. Rather, each case merely involved the plaintiff's failure, at trial, to establish the partnership's liability for an individual partner's actions. Moreover, although dismissal may have been proper in a factually dissimilar case, it does not mean that dismissal is appropriate in this case.

The heart of Coudert's argument is that the alleged conduct could not have been in furtherance of Coudert's practice of law because it involved a fraudulent scheme, which is an odd and theoretical construct imposed upon the statute. Furthermore, the New York Partnership statute does not exclude fraud as a wrongful act giving rise to vicarious liability, and partnership's [sic] have been held liable for the fraudulent conduct of individual partners

even when the other partners had "not the slightest connection with, knowledge of, or participation in the fraud." *Model Building & Loan Association v. Reeves,* 186 N.Y.S. 759 (1921), *rev'd,* 194 N.Y.S. 383 (1922), *rev'd,* 140 N.E. 715 (1923).

The complaint alleges that Coudert Brothers, through Oliner, was retained by Zolt and Steinberg to act on behalf of Bob Marley as attorneys and international tax consultants. The complaint further alleges that after Marley's death, Oliner, in conjunction with Zolt and Steinberg, defrauded Marley's estate through, inter alia, the execution of false legal document's [sic] and the dissolution and creation of corporations. The Court cannot say, as a matter of law, that the alleged acts of Oliner were beyond the scope of his authority. That is an issue of fact not properly resolvable on a motion to dismiss.

Coudert contends that no fiduciary duty existed between Coudert and the Marley estate and, therefore, no breach of fiduciary duty can be found as to Coudert. Coudert also argues that in the absence of an attorney client relationship, plaintiff cannot sustain a negligence action against Coudert.

For an attorney to act as a legal representative, a contract of employment, either express or implied, must exist between the attorney and the party for whom he purports to act. *People v. Brown,* 174 N.Y.S.2d 147 (1958). Even where an attorney is authorized to act as a legal representative, the death of the client terminates the relationship. *Gross v. New York State Teachers Retirement System,* 366 N.Y.S.2d 777 *rev'd on other grounds,* 376 N.Y.S.2d 36 (3d Dept. 1975). After the client's death, the attorney

may not act further until he is authorized to do so by the successor in interest of the former client. *Pfeffer v. Gramse*, 50 N.Y.S.2d 74 (Sup. Ct. 1944). If no attorney client relationship exists creating a duty of care on the part of the attorney, there can be no action for negligence against the attorney under New York law. *Hashemi v. Shalck*, 609 F. Supp. 391 (S.D.N.Y. 1984).

As already noted, Oliner was retained by Steinberg and Zolt to represent Marley before his death. The complaint goes on to detail Oliner's joint participation in the scheme to defraud the Estate, but it does not state that Oliner was retained by Steinberg and Zolt or by the Estate Administrator after Marley's death. In *Hashemi, supra.* at 393, the court observed that "[f]ormality is not an essential element in the employment of an attorney, and 'since "[t]he initial arrangement for representation are often informal . . . it is necessary to look at the words and actions of the parties." ' " (quoting *People v. Ellis*, 397 N.Y.S.2d 541, 545 (N.Y. Sup. Ct. 1977)). That statement, however, goes to the question of proof and not to the sufficiency of the pleadings. Read broadly, the complaint does not allege that Oliner acted as an attorney for the Estate.

In his affidavit in opposition to defendants' motions to dismiss, Bingham annexes a photocopy of a bill dated January 4, 1982, from Coudert Brothers to the Estate for "professional services rendered." While the bill may establish that Oliner did, in fact, represent the Estate, the Court is constrained to consider only the complaint, documents attached to it as exhibit, and documents incorporated in the complaint by reference. *Goldman v. Belden*, 754 F.2d 1059, 1065-66 (2d Cir. 1985). Unlike the Byles

affidavit and the Rita Marley letter, the Coudert bill as well as the allegation that Coudert represented the Estate come as a complete surprise to Coudert. If plaintiff wishes to allege that Coudert, through Oliner, had an attorney-client relationship with the Estate, he should amend his complaint to do so.[5]

In sum, Count VI is dismissed with prejudice. Counts I, II, III, IV, V, and VII are dismissed as against Oliner, Oliner, P.C., and Coudert with leave to replead. Defendants' motions to dismiss are in all other respects denied.

SO ORDERED

/s/ Kenneth Conboy
KENNETH CONBOY
United States District Judge

Dated: April 15, 1988
New York, New York

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[5] If plaintiff amends his complaint to allege that Oliner represented the Estate until September of 1986, than, under the doctrine of continuous representation, plaintiff's state law claims against Oliner will be timely. According to the complaint, Oliner ceased acting on behalf of Coudert in October, 1981. There is no allegation in the complaint that Coudert represented the Estate after Oliner ceased acting on Coudert's behalf. Consequently, the doctrine of continuous representation is insufficient to toll the statutes of limitations governing the state claims against Coudert even if the applicable limitations periods did not begin to run until October, 1981.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of November one thousand nine hundred and ninety-five.

J. Reid Bingham, as Ancillary Administrator of the Estate of Robert Nesta Marley,

Plaintiff-Appellee,

v

Marvin Zolt, Zolt & Loomis, P.C., and David J. Steinberg,

Defendants-Appellants,

Greenstein, Gorelick, Price, Silverman & Laveson,

Defendant,

Bluestein, Rutstein & Mirarchi, P.C., Martin Oliner, Martin Oliner, P.C. and Coudert Brothers,

Defendants-Third-Party-Plaintiffs,

Rita Marley and Mutual Security Merchant Bank and Trust Company,

Third-Party-Defendants.

Dkt No: 93-7695

(Filed Nov. 15, 1995)

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant David J. Steinberg.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

Mirarchi, P.C., and the Court thereafter on June 17, 1993, having rendered its opinion and order (#71658), dated June 7, 1993, reducing the punitive damage award of $250,000.00 as against defendant Mr. Steinberg, as opposed to the previous figure of $1,000,000.00, and awarding the plaintiff attorneys' fees and disbursements in the sum of $3,029,428.46, it is,

ORDERED, ADJUDGED AND DECREED: That defendants' motions for the imposition of their costs against plaintiff be and it is hereby denied, and it is further,

ORDERED, that defendants' motions to dismiss the claims against third-party defendants' [sic] Rita Marley and the Mutual Security Merchant Bank and Trust Company as moot rather than on the merits be and it is hereby denied, and it is further,

ORDERED, that Rita Marley's motion to alter or amend the judgment be and it is hereby denied, and it is further,

ORDERED, that the negligence, gross negligence and conversion claims as against Marvin Zolt, David Steinberg and Zolt & Loomis, P.C., be and they are hereby dismissed as time-barred, and it is further,

ORDERED, that the claims in the Second Amended Complaint of the Plaintiff as to defendants Bluestein, Rutstein & Mirarchi, P.C.; Greenstein, Gorelick, Price, Silverman & Laveson; Martin Oliner; Martin Oliner, P.C.; and Coudert Brothers be and they are hereby dismissed on the merits, and it is further,

ORDERED, that the claims in the third party complaints of Coudert Brothers, Martin Oliner, Martin Oliner, P.C., and Bluestein, Rutstein & Mirarchi, P.C., as against Rita Marley and Mutual Security Merchant Bank and Trust Company be and they are hereby dismissed on the merits, and it is further,

ORDERED, that plaintiff, J. Reid Bingham, as Ancillary Administrator of the Estate of Robert Nesta Marley, have judgment as against defendants, Marvin Zolt, David Steinberg and Zolt & Loomis, P.C., jointly and severally, in the amount of $2,861,409.79, and it is further,

ORDERED, that plaintiff, J. Reid Bingham, as Ancillary Administrator of the Estate of Robert Nesta Marley, have judgment as against defendant, David Steinberg, in the amount of $250,000.00 for punitive damages, and it is further,

ORDERED, that plaintiff, J. Reid Bingham, as Ancillary Administrator of the Estate of Robert Nesta Marley, as against defendants, Marvin Zolt, David Steinberg and Zolt & Loomis, P.C., jointly and severally, in the amount of $3,029,428.46 for attorneys fees and disbursement, and it is further,

ORDERED, that the judgment (#92,2922) filed on January 4, 1993 be and it is hereby amended.

DATED: New York, New York
July 16 1993

/s/ James M. Parkison
Clerk

By: /s/ Illegible
Deputy Clerk

APPROVED:

/s/ Kenneth Conboy
U.S.D.J.